SUPREME COURT, U.S.
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NO.93-1012

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

LARRY NORRIS, Interim Director
Arkansas Department of Correction
PETITIONER

v.

MICHAEL RAY ORNDORFF
RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL RAY ORNDORFF, Respondent

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Attorney for Respondent

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE UNITED STATES COURT OF APPEALS' DETERMINATION THAT AFTER BRECHT, THE CHAPMAN HARMLESS ERROR STANDARD STILL BE APPLIED IN A HABEAS CASE, IS ERROR?

PARTIES

The parties to this proceeding are Larry Norris, Interim Director, Arkansas Department of Correction, Petitioner, and Michael Ray Orndorff, an inmate on death row in the Arkansas Department of Correction, Respondent. Respondent files this response to petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

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OPINIONS BELOW

The opinion of the Arkansas Supreme Court on Direct appeal is contained in the appendix. The official citation to the opinion is Clines v. State, 280 Ark. 77, 656 S.W.2d 684 (1993), cert. denied, 465 U.S. 1051 (1993).

The opinion of the Arkansas Supreme Court in the Case for collateral relief pursuant to Arkansas State law is Clines v. State, 282 Ark. 541, 669 S.W.2d 883 (1984); it is reproduced as appendix "B" hereto.

The opinion of the Untied States District Court for the Eastern District of Arkansas, by the Honorable Henry Woods, is reproduced as appendix "C" hereto, and is reported as Orndorff v. Lockhart, 707 F.Supp. 1062.

The opinion from with Certiorari is sought is from the United States Court of Appeals for the Eighth Circuit, and is reproduced as appendix "D" hereto, and is reported as Orndorff v. Lockhart, 906 F.2d 1230 (8th Cir. 1990).

The opinion, after remand, of the United States District Court for the Eastern District of Arkansas, by the Honorable Henry Woods, (denying petitioner relief), is reproduced as appendix "E" hereto.

The split opinion of the three judge panel of the United States court of Appeals for the Eight Circuit (denying relief to three of the four petitioners), is reproduced as appendix "F" hereto.

The split opinion of the en banc United States Court of Appeals for the Eight Circuit (affirming the denial of relief to three of the four petitioners) is reproduced as appendix "G" hereto. It is from this decision that certiorari is sought.

JURISDICTIONAL STATEMENT

Petitioner asserts that this Court has discretionary jurisdiction to review this case pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Confrontation Clause of the Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right....to be confronted with the witnesses against him;...

STATEMENT OF THE CASE

Respondent, Michael Ray Orndorff, was convicted of capitol murder for the killing of Donald Lehman and sentenced to death. There were three other co-defendants convicted with him, Hoyt F. Clines, James W. Holmes, and Darryl V. Richley, and they also received the death penalty. The victim's daughter, Vickie Lehman, who was an eyewitness to the murder, gave two statements to the police shortly after the crime describing the events of that night. The prosecution then had Vickie Lehman undergo hypnosis on two separate occasions prior to trial to try and help her remember more details about the crime and the killers. During the second hypnosis the prosecution staged a reenactment of the crime. The prosecution failed to tell the defense attorneys about the hypnosis. This was discovered during the federal habeas proceedings. The district court found that the prosecutor's failure to inform the defense about the hypnosis was constitutional error but found that it was harmless as to the guilt phase of the bifurcated trial, but held that the error was not harmless as to the penalty phase of the trial. Orndorff v. Lockhart, 707 F.Supp. 1062 (E.D. Ark. 1988). On appeal, the Eighth Circuit Court of Appeals agreed that the error was harmless as to the guilt phase, but remanded that case to reconsider the question regarding the penalty phase. Orndorff v. Lockhart, 906 F.2d 1230 (8th Cir. 1990), cert. denied, 111 S.Ct. 1338 (1991). On remand, the district court found the error was harmless beyond a reasonable

doubt under Chapman v. California, 286 U.S. 18 (1967). On appeal, the Eighth Circuit held that in spite of this Court's recent decision in Brecht v. Abrahamson, 113 S.Ct. 1710 (1993), the standard to be applied was still the Chapman standard in this habeas case.

The Eighth Circuit Court of Appeals reversed as to Respondent Orndorff finding that the error was not harmless beyond a reasonable doubt. Orndorff v. Lockhart 988 F.2d 1426 (8th Cir. 1993). Petitioner seeks review of certiorari from that decision.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I.

THE COURT OF APPEALS DETERMINATION
THAT AFTER BRECHT THE CHAPMAN HARMLESS
ERROR STANDARD STILL APPLIED TO
THIS HABEAS CASE, IS CORRECT.

The Separate Respondent, Michael Orndorff, had raised a claim of violation of the Confrontation Clause in his original habeas petition. The Respondent along with his three co-defendants were convicted of capitol murder for the murder of Donald Lehman, during the robbery of Lehman's home in Rogers, Arkansas. Vickie Lehman, the victims daughter and Virginia Lehman, the victim's wife, were eyewitnesses to the incident. Vickie Lehman gave two statements to the police after the incident. The first statement was given of the night of the crime and the second statement was given four days later. Vickie Lehman was then hypnotized on two separate occasions, in an attempt to enhance her memory and to hopefully discover more details about the crime. The first hypnosis was conducted in the hypnotist's office in Rogers, Arkansas. The second hypnosis was conducted immediately prior to the re-enactment of the crime. The prosecuting attorney was present at the re-enactment of the crime. It is not argued that the defense was not told about they had hypnosis until after the direct appeal was filed with the Supreme Court of the State of Arkansas. Therefore, this issue is not raised in state court.

The District Court found that the prosecutor's failure to inform the defense about the hypnosis was a constitutional error but that it was harmless beyond a reasonable doubt as to the guilt phase of the bifurcated trial. However, it held that the error was not harmless as to the penalty phase of the trial. Orndorff v. Lockhart, 707 F.Supp 1062 (E.D. Ark. 1988). On appeal, the Eight Circuit Court of Appeals agreed that the error was harmless beyond a reasonable doubt as to the guilt phase, but remanded the case to the district court to reconsider the question regarding the penalty phase. Orndorff v. Lockhart, 906 F.2d 1230 (8th Cir. 1990), cert. denied, 111 S. Ct. 1338 (1991). The Court of Appeals instructed the District Court to conduct a comparison of Vickie Lehman's trial testimony with the two statements given before her hypnosis in order to determine if a confrontation clause violation occurred and, if so, whether it was harmless beyond a reasonable doubt. Orndorff v. Lockhart, 906 F.2d at 1232. After the parties had filed briefs with the case, this court decided the case of Brecht v. Abrahamson, 507 U.S.-, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). The Eighth Circuit Court then requested additional briefs regarding the impact of Brecht on this case. After oral argument, the Eight Circuit Court of Appeals held that because this Confrontation Clause issue was not raised in state court, there had been no harmless beyond a reasonable doubt analysis under Chapman v. California, 386 U.S. 18 (1967), and therefore, this Court's decision in Brecht would not apply. Orndorff v. Lockhart, 998 F.2d 1426, 1430 (8th Cir. 1993). The Eighth Circuit Court of Appeals

agreed that an analysis under Brecht would normally cover this issue but not in the present case. The Eighth Circuit Court of Appeals thus reversed its original denial of relief as to the respondent Orndorff. Orndorff v. Lockhart, 998 F.2d at 1436. The sole issue raised on this petition by the state is whether the alleged constitutional violation, i.e. the State's failure to disclose that one of its witnesses had been hypnotized, constituted harmless error and which standard to apply. The Court recently modified the standard to be applied for reviewing a constitutional violation. It is correct that the Court has modified the standard to be applied for reviewing a constitution violation for harmless error. Brecht v. Abrahamson, 507 U.S. _____, 113 S.Ct. 1710 (1993). The new standard is "whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.'" The Eighth Circuit declined to apply the standard and instead to apply the standard previously established in Chapman v. California, 386 U.S. 18 (1967).

Despite the petitioners contention, the Eighth Circuit Court of Appeals was correct in its analysis of the facts of this case when it stated:

> The Brecht rule is based on the notion that because the state courts can properly apply the Chapman harmless error standard on direct review, the federal habeas courts need only review those decisions under the Kotteakog harmless error standard. However, in the case before us, thee state courts did not have the opportunity to review the error at all and the federal habeas court was the first court to review the constitutional error under the Chapman harmless errors standard. As a result, we find the rule announced in Brecht does not apply and that the Chapman harmless error standard and is the appropriate test in this case.

Orndorff, 988 F.2d at 1430.

The Court's finding in Brecht was based upon a number of factors. First, state courts are qualified to perform the review of constitutional errors under the harmless error analysis of Chapman v. California, 386 U.S. 181 (1967). Second, continued review of a case by a federal court under the same standard of review used by the state court is a threat to the state's sovereignty over criminal matters, and ignores the state's interest in the finality of their trial decisions. The basic philosophical undermining of Brecht is that harm results from continued review of the same issue under the same standard by state courts and then by federal courts. Therefore, the Supreme Court determined that different standard of review should be applied to habeas review of state court decisions on constitutional trial errors.

However, the Court specifically validated Chapman, pointing out that this review was a necessary component of the protection against constitutional violations and was necessary to insure proper review of constitutional errors. The Court stated:

> State course are fully qualified to identify constitutional error and evaluate its prejudicial effect on the trial process under Chapman, and State courts often occupy a superior vantage point from which it evaluate the effect of trial error.

Brecht 61 L.W.at 4340.

Based upon the reasoning, the Court chose not to apply the Chapman review to habeas cases, although it had specifically done so previously in Yakes v. Evatt, 500 U.S.___(1991), a case with the Appellants relied upon in their prior brief.

The instant case involved a Confrontation clause violation. (The District Court also found a 14th Amendment Due Process clause violation.) If these violations had been brought to the attention of the Arkansas Supreme Court on direct appeal, that court would have been obliged to perform a Chapman review, determining whether the State had proven that the violation was harmless beyond a reasonable doubt. However, the violation in this case was the hypnosis of the main state witnesses, which violation was not discovered until the habeas proceeding.

Brecht is distinguishable from the case at bar in that it does not involve successive (or excessive) reviews under the Chapman standard. This is the first review of this issue by any court, and it should be conducted under the Chapman standard, not under Brecht.

The thrust of the Brecht decision is that the Chapman standard of proof of harmless error beyond a reasonable doubt is an important protection of the rights of defendants against Constitutional trial errors. The Court merely pointed out that the state courts were in a position to properly review Constitutional errors under Chapman standard. The harm of excessive reviews, a threat to state sovereignty over criminal matters, and the State's interest in the finality of its decisions are not present in this case because the Arkansas Courts have never had the opportunity to review this error.

In fact, the majority opinion concurrences and the dissents in Brecht recognize the "notion that Chapman's harmless-error standard

is required to protect constitutional rights." (White, J., dissenting, 61 L.W. at 434). The only issue, therefore, is whether the Federal Court should also apply this standard.

Thus, Brecht is completely distinguishable from the case at bar. Because there has never been a Chapman review by any court in this case, it is required that one be done by this court, as it is the only remaining forum available to the Appellants. Every criminal defendant should be entitled to a Chapman review of possible constitutional violations, which would have been given had the issue been presented to the State Court.

Because of the importance of the Chapman review, if this court finds that the fact that the State court did not perform the review because the issue was not presented is insufficient to trigger an exception to Brecht, then the additional fact that the issue was not presented because of the State's conduct should create an exception and trigger the Chapman review. This is not an argument under Footnote 9 of Brecht because it is appellant's contention that, due to the importance of the Chapman review, all that is necessary to trigger this exception is that there was a constitutional error which would have been presented to the State Court for Chapman review and the State's conduct not precluded that review.

The State court has not had the opportunity to review this constitutional violation, solely because of the State's conduct. To decline to apply the Chapman standard in this case would make the standard of review applicable to constitutional violations

dependant upon when the violation was discovered, and thus become hostage to the State's actions. To refuse to conduct this review under the Chapman standard would therefore reward the prosecutor for his misconduct and would, in effect, encourage other prosecutors to knowingly hide errors, since they would benefit by hiding constitutional violations until the post-conviction stage.

The District Court, in its original 1988 opinion, found that the prosecutor's action was intentional, in that he know or should have known that the hypnosis had to be disclosed. The District Court also found that the prosecutor knowingly failed to disclosed the hypnosis in response to interrogatories and in violation of state law.

This court can never know what the State court's conclusion may have been had the error been reviewed under the Chapman standard, since the prosecutor's nondisclosure circumvented this safe guard in the system. Therefore, the State should not benefit by having to meet a lessor standard of proof than the Chapman standard because of its misconduct. To do so would allow the prosecutors to dictate the standards of review by their disclosure and benefit from nondisclosure.

This case falls under the exception noted in Footnote 9 of the Brecht decision. The Supreme Court, in Brecht, stated in Footnote 9 that:

> Our holding does not foreclose the possibility that in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even it did not substantially influence the jury's verdict.

This is exactly the sort of case that the exception was meant to remedy.

It is undisputed that the prosecutor's error in this case was deliberate. The prosecutor did not disclose the hypnosis, in violation of Arkansas Rule of Criminal Procedure 17.1 and in violation of a pre-trial court order (July 29, 1988, District Court opinion at 14). In addition, the prosecutor testified at the habeas hearing that he had done legal research and located the case of United States v. Adams, 581 F.2d 193 (9th Cir. 1977), cert. denied, 439 U.S. 1006 (1978), which expressly states that the fact the hypnosis has been undertaken must be disclosed. (July 29, 1998, District court Opinion at 13).

The Prosecutor, in spite of this knowledge, decided not to disclose the hypnosis.

The District Court's original Decision pointed out the harm of hypnosis and the haphazard and the unprofessional manner in which this hypnosis was conducted. (July 29, 1988, District Court Opinion at 4-7) The error was the use of hypnosis in such an unprofessional manner, and the resulting reliance up on the witness by the prosecuting attorney and his arguments to the jury that they should rely on the "amazing recollection" of the hypnotized witness. (July 29, 1988, District Court Opinion at 11) As the District Court pointed out in its original decision, the action of the Prosecutor and his conduct during the trial indicates that he was intentionally misleading the jury as to the source of Vicki Lehman's newly discovered memory, and misleading the jury and court

as to whether hypnosis had been conducted. (July 29, 1988, Opinion at 8-12)

To apply the word "error" to the facts of this instant case is a misnomer. It is not a constitutional error, but deliberate violation of the Confrontation Clause.

A review of the Appellant's 1988 original brief, pages 1-11, sets out the basis for this claim. The scope of the misconduct can be seen in the later case of Rock v. Arkansas, supra, where this same prosecutor, who had hypnotised Vicki Lehman, objected to the introduction of hypnotically enhanced testimony by the defendant, Rock, during his prosecution. This prosecutor apparently discloses evidence and applies the rules only when they enure to his benefit.

This violation infected the entire integrity of the proceeding, as seen by the hypnotically enhanced statements of Vickie Lehman, and in the sentence of death. Four men are on death row, only one of whom actually shot the victim and only two (or maybe three, or four, according to Lehman's post-hypnotic testimony) of whom were armed with guns. The severity of the result, despite the differing culpability and mitigation, shows the extent to which this proceeding was infected.

Because of the misconduct set out above, and the pattern of deception with which the prosecutor set out to hide his misdeeds, the case fulls under the Footnote 9 exception.

CONCLUSION

This case does not present any issues that are worthy of any review of the decision by the Eighth Circuit Court of Appeals. The Eighth Circuit Court of Appeals was correct in granting relief to the Respondent. There are no special or important reasons for this Court to review on Writ of Certiorari.

Respectfully submitted,

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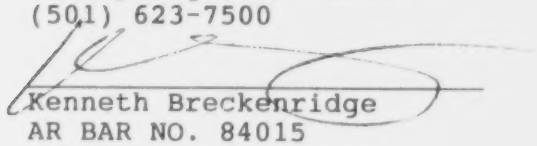

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CERTIFICATE OF SERVICE

I, Kenneth Breckenridge, do hereby certify that I have served a copy of the above and foregoing pleading upon all attorneys of record for all other parties in this action, by placing a copy of same in U.S. mail, postage prepaid, on this 26 day of March, 1994.

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Hoyt Franklin CLINES, James William Holmes, Darryl V. Richley and Michael Ray Orndorff, Appellants,

v.

STATE of Arkansas, Appellee.

No. CR 82-54.

Supreme Court of Arkansas.

July 5, 1983.

Rehearing Denied Oct. 3, 1983.

Defendants were convicted in the Benton County Circuit Court, William H. Enfield, J., of capital murder, and were sentenced to death, and they appealed. The Supreme Court, Hays, J., held that: (1) the capital murder statute did not violate defendants' constitutional rights on basis that the statutory scheme did not require the jury to consider the culpability of each individual defendant; (2) the trial court did not abuse its discretion in refusing to grant separate trials; (3) the trial court did not abuse its discretion in limiting the four defendants to a total of 12 peremptory challenges; (4) it was not an abuse of discretion for the trial court to order a five-day recess; (5) reversible error did not occur due to introduction of evidence of other crimes and acts against two defendants; and (6) the uncorroborated testimony of an accomplice that he and two defendants had previously committed another felony by the use or threat of violence was properly admitted to prove the aggravating circumstance that a crime of violence was previously committed.

Affirmed.

Dudley, J., concurred in part, dissented in part, and filed opinion.

Purtle, J., dissented and filed opinion.

1. Homicide ⇐351

Capital murder statute did not violate defendants' constitutional rights on basis that the statutory scheme did not require jury to consider culpability of each individual defendant, since blame for the murder rested with near equality on all defendants, and safeguards existed in the system against arbitrary imposition of the death penalty. Ark.Stats. § 41-1501(1)(a).

2. Criminal Law ⇐622(2)

In prosecution of four defendants for capital murder, trial court did not abuse its discretion in refusing to grant a separate trial for each defendant, since defenses were not antagonistic, and joint trial of defendants did not result in substantial injustice. Rules Crim.Proc., Rule 22.3.

3. Jury ⇐108

In prosecution of four defendants for capital murder, trial court did not abuse its discretion in its exclusion of two veniremen for cause and acceptance of one venireman based on their attitude toward the death penalty.

4. Jury ⇐136(6)

In prosecution of four defendants for capital murder, trial court did not err in limiting defendants to a total of 12 peremptory challenges where no argument was offered that for a specific reason one prospective juror was objectionable to one of the defendants, though not to the others.

5. Criminal Law ⇐649(1)

In prosecution of four defendants for capital murder, trial court did not abuse its discretion in ordering a five-day recess between taking of testimony and the instructions and argument.

6. Criminal Law ⇐1038.1(3)

Supreme Court would decline to consider defendants' objection that it was error for jury to find aggravating circumstance that in commission of the capital murder, each of the defendants knowingly created a great risk of death to a person other than the victim, where such point was not preserved by an objection to the instructions or to the verdict forms.

7. Criminal Law ⇐1169.11

In prosecution of four defendants for capital murder, reversible error did not occur due to introduction of evidence of other

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crimes and acts against two of the defendants. Rules of Evid., Rule 404(b).

8. Criminal Law ⇐986.6(3)

In sentencing phase of prosecution of four defendants for capital murder, trial court properly allowed uncorroborated testimony of accomplice that he and two of the defendants had previously committed another felony by the use or threat of violence in order to prove the aggravating circumstance that a crime of violence was previously committed. Ark.Stats. § 41-1303.

9. Criminal Law ⇐867

In prosecution of four defendants for capital murder, trial court did not err in refusing to grant a mistrial after testimony concerning out-of-court statements of one defendant which allegedly implicated another defendant.

10. Criminal Law ⇐867

Objections must be timely, and mistrial should be declared only when trial court is certain the trial cannot, in fairness, continue.

11. Searches and Seizures ⇐3.9

Evidence was sufficient to sustain finding that affidavit for search warrant of defendant's car and apartment was proper, and that defendant gave a lawful consent to the search. Rules Crim.Proc., Rule 36.24; Sup.Ct.Rules, Rule 11(f).

Marshall N. Carlisle, Fayetteville, Donald R. Huffman, Bentonville, Priscilla Karen Pope, Fayetteville, and Thomas J. Tucker, Siloam Springs, for appellants.

Steve Clark, Atty. Gen. by Dennis R. Molock, Deputy Atty. Gen., Little Rock, for appellee.

HAYS, Justice.

These four appellants were jointly tried and convicted of the January 8, 1981 capital murder of Don Lehman, a Rogers householder, and of the aggravated robbery of his wife and daughter. They were sentenced to death by electrocution on the capital murder charge and to life sentences on the two aggravated robbery charges. On appeal they allege a number of errors of law and procedure as grounds for reversal. Finding no error, we affirm the convictions and the sentences imposed.

I.

THE TRIAL COURT ERRED IN FINDING THE ARKANSAS CAPITAL MURDER STATUTE CONSTITUTIONAL.

Appellants make a four-fold attack on the constitutionality of the Arkansas felony murder statute, Ark.Stat.Ann. § 41-1501(1)(a) (Repl.1977), which provides that capital murder occurs if a person, acting alone or with others, commits one of several felonies, including robbery, in the course of which either he or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life. Appellants argue that the statute is vague and overbroad; that it denies equal protection of the law inasmuch as there are currently twenty-three men, but no women, on death row; that the imposition of the death penalty is arbitrary and capricious because the prosecuting attorney is given discretionary power to waive the death penalty and because the jury must return a death verdict if they find aggravating circumstances outweigh mitigating circumstances; and finally that our statutory scheme does not require the jury to consider the culpability of each individual defendant.

The vagueness argument has been raised and answered more than once. In *Cromwell v. State*, 269 Ark. 104, 598 S.W.2d 733 (1980), we pointed out that in the definition of criminal offenses some generalization is both unavoidable and desirable so that prosecutors and juries may have leeway to lighten the punishments that might be imposed for conduct that falls within overlapping offenses. (See *Cromwell* at p. 107, 598 S.W.2d 733).

The claim that the equal protection clause of the constitution is offended because men are given the death penalty disproportion-

ately to women is raised initially on appeal and, beyond that, is supported by argument alone.

We disagree that juries are bound under our statutory scheme to return a verdict of death if they find aggravating circumstances outweigh mitigating circumstances. We have pointed out in several cases that whatever the jury may find with respect to aggravation versus mitigation, it is still free to return a verdict of life without parole, simply by finding that the aggravating circumstances do not justify a sentence of death. [See *Williams v. State*, 274 Ark. 9, 621 S.W.2d 686 (1981), and Ark.Stat.Ann. § 41–1302(2)(c).] Additionally, because the capital murder statute and the first degree murder statute overlap in appropriate cases, the jury may refuse consideration of both the death penalty and life without parole, by returning a guilty verdict as to the charge of murder in the first degree. *Wilson v. State*, 271 Ark. 682, 611 S.W.2d 739 (1981). This jury had that option.

The argument that prosecutorial discretion in seeking the death penalty is arbitrary and capricious has been dealt with by the Supreme Court of the United States (*Bordenkircher v. Hayes*, 434 U.S. 357, 359, 98 S.Ct. 663, 665, 54 L.Ed.2d 604 (1978)); and by us (*Miller v. State*, 269 Ark. 341, 605 S.W.2d 430 (1980)). It needs no further review.

[1] The claim that our statutory scheme does not require the jury to separately weigh each defendant's role in a crime involving capital murder, so as to determine individual culpability, might be disposed of on procedural grounds, as the argument was not clearly raised below, i.e. we find no objection to the capital murder instructions, nor did the appellants tender to the trial court an instruction consistent with their view of the law. *Schwindling v. State*, 269 Ark. 388, 602 S.W.2d 639 (1980). However, we choose to consider the merits of the argument.

Appellants cite *Enmund v. Florida*, —— U.S. ——, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). There, the Supreme Court held that death was a cruel and unusual punishment for one who had participated in a robbery during which murders were committed, but was not present at the killings and did not intend that the victims be killed. The court noted that the record supported no more than an inference that Enmund, the petitioner, was the person waiting in a car near the scene of a robbery. Two others had gone to the rear of a nearby farmhouse and, on a pretext of having car trouble, coaxed the victim outside to rob him. When the victim called for help his wife came out and shot one of the robbers. The two victims were killed in a gun battle and the robbers fled with their money to a waiting car.

Relying on the Eighth Amendment, the court held that one who does not intend that a robbery victim be killed, is not present when the killing occurs, and does not contemplate that lethal force will be used in carrying out the robbery, is not subject to the death penalty. A Florida jury had found Enmund and a co-defendant guilty and recommended the death penalty for both defendants, which the trial court imposed. Acknowledging the absence of any direct evidence that Enmund was present at the killings, the Supreme Court of Florida affirmed, explaining that the interaction of the felony murder rule and the law of principals combine to make a felon generally responsible for the lethal acts of his co-felons. As it did with death as a penalty for rape (see *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977)), the court reasoned that an overwhelming number of states and of American juries would repudiate the death penalty for crimes such as Enmund's.

Significant comments are in the opinion, first, that there was no evidence that Enmund had any intention of participating in, or facilitating, a murder and, second, the court emphasized that "[i]t would be very different if the likelihood of a killing in the course of a robbery were so substantial that one should share the blame for the killing if he somehow participated in the felony." Here, a number of distinguishing factors immediately appear. At about 9:45 p.m., after he and his family had retired for the

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evening, Don Lehman answered a knock at his front door. He asked who was there and someone answered "David." His daughter, Vickie, also responding to the knocking, said as her father unlocked the door the four appellants, masked and armed, burst into the room with such force that her father was knocked backward off his feet and the doorknob of the front door was jammed through a closet door behind. Two or three of the appellants struggled with her father toward the bedroom, where Mr. Lehman was wrestled onto the bed and a fatal shot to the head and one to the abdomen were delivered.

There was direct evidence from more than one source that appellants had discussed among themselves the necessity of murder if they met resistance; at least two of the appellants were armed with pistols, perhaps three of them, and the fourth with a lethal weapon fashioned from a metal chain. All four wore ski masks and all four burst into the Lehman home when the latch was opened. The proceeds, some $1,200, were presumably divided to the appellants' liking. It must be noted, too, that Lehman was given no opportunity to yield, he was immediately attacked by appellants, sustaining blows to his head and face from the metal chain and a mortal wound to the chest before reaching the bedroom.

Although perhaps only two of the appellants were in the bedroom when Mr. Lehman was killed, it cannot be ignored that when a group of individuals agree to execute a criminal enterprise involving the forced, nighttime entry of a private dwelling, known to be occupied, wearing masks and armed with pistols, intent on robbery, it follows that murder is a most probable consequence. We think the likelihood of a homicide under the circumstances is so substantial as to bring this case clearly within the quoted exception of the *Enmund* decision, on those circumstances alone. Added to that is the evidence that murder was plainly contemplated by the appellants. We conclude the blame for Don Lehman's murder rests with near equality on all of the appellants.

As a final response to this phase of the argument, we point out that there are added safeguards in our system against the arbitrary imposition of the death penalty. In *Collins v. State*, 261 Ark. 195, 548 S.W.2d 106 (1977), we noted the power of the trial court to reduce a death sentence to life imprisonment and in that opinion we committed this court to a policy of comparative review, by examining the death penalty in every case on a comparable basis. We have demonstrated our readiness to modify the death sentence where it is imposed capriciously (see *Sumlin v. State*, 273 Ark. 185, 617 S.W.2d 372 (1981)), or where the culpability of co-felons is disproportionate [see *Henry v. State*, 278 Ark. 478, 647 S.W.2d 419 (1983)], or where death is unduly harsh under the circumstances [*Neal v. State*, 274 Ark. 217, 623 S.W.2d 191 (1981) and *Giles v. State*, 261 Ark. 413, 549 S.W.2d 479 (1977)].

We are not overlooking the suggestion that Michael Orndorff's participation in the crime was half-hearted; that he may have asked to be taken home as the appellants were leaving the Baker residence; and that after the shooting he disclaimed any wish to be involved in a murder. But the jury unanimously rejected as a mitigating factor that any appellant played a minor role. Too, Orndorff's request to be taken home may have been due to Steve Baker's having declined to go along, rather than because of any compunctions over the undertaking. And his belated comment that he didn't want to be a part of a murder must be judged from the standpoint that it came *after* the fact and against the uncontradicted proof that he burst into the Lehman home along with the others, masked and intent on robbing, killing, if need be, anyone who resisted. We need not repeat what we have already said about the shared culpability for Don Lehman's death under the circumstances of this case. To selectively exclude this appellant from the penalty imposed by the jury for conduct readily assumed by all of them would be to arbitrarily excuse him from the predictable consequences of his own actions, consequences which the proof showed he expressly recognized.

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II.

THE TRIAL COURT ERRED IN REFUSING TO GRANT A SEPARATE TRIAL FOR EACH DEFENDANT.

[2] Prior to the adoption of the Arkansas Rules of Criminal Procedure in 1976, defendants in capital cases were entitled to severance as a matter of right pursuant to Ark.Stat.Ann. § 43–1802 (Repl.1977). However, A.R.Cr.P. Rule 22.3 superseded § 43–1802 and gives discretion to the trial court to try the defendants jointly in capital cases. *Hallman and Martin v. State*, 264 Ark. 900, 575 S.W.2d 688 (1979).

Appellants submit that our recent decision in *McDaniel and Gookin v. State*, 278 Ark. 631, 648 S.W.2d 57 (1983), requires a reversal of this case, but the argument cannot be sustained. There are fundamental differences between the two cases and in *McDaniel* we did not disturb the rule that severance of defendants rests within the sound discretion of the trial court. We pointed out that such discretion is broad, though to be exercised judiciously in capital cases, with careful scrutiny to be given to a number of elements which could affect the fairness of the trial. (See *McDaniel and Gookin v. State*, page 638, 648 S.W.2d 57). In *McDaniel*, the defenses of the defendants were utterly antagonistic, each defendant claiming the murder was committed unexpectedly by the other. No such similarity exists here. It is argued that the defenses in this case are antagonistic, but that claim cannot be supported. We find no effort among the defendants to point to another defendant as the murderer; the proof on behalf of each defendant (only one of whom testified) was aimed for the most part at proving he was not in the bedroom, where the murder occurred. These defenses are not in the least antagonistic in the same sense as in *McDaniel*.

The final and essential difference is that the *McDaniel* case had the added element that where culpability was distinctly disproportionate, the jury was admittedly unable to decide which of the two defendants committed a heinous act, resulting in two defendants being convicted of a capital crime for which only one may have been guilty. Whereas here, there is substantial evidence, indeed overwhelming evidence, that all four appellants planned and executed a robbery, expressly deliberating on murder as a possible consequence. Nothing in this record suggests that for these appellants to be tried jointly resulted in substantial injustice and we find no abuse of discretion in the trial court's refusal to grant separate trials.

III.

THE USE OF A DEATH QUALIFIED JURY IN THE INSTANT CASE DENIED THE APPELLANTS AN IMPARTIAL JURY ON THE ISSUES OF GUILT AND PUNISHMENT AS REQUIRED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

The gist of this argument is that when those members of a jury panel holding religious or conscientious scruples against capital punishment are eliminated, the cross-section of the population which remains is not impartial and unbiased on the issues of guilt and punishment. They are, it is urged, favorable to the prosecution and, hence, guilt prone. The argument is not new and needs no reiteration. It has been considered and rejected here as well as in the Supreme Court of the United States. *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968); *Miller v. State*, 269 Ark. 341, 605 S.W.2d 430 (1980).

IV.

THE JURY SELECTED IN THE INSTANT CASE WAS NOT SELECTED IN ACCORDANCE WITH THE STANDARD PRESCRIBED IN WITHERSPOON AND HOBBS.

[3] The *Witherspoon* rule, as interpreted in *Hobbs v. State*, 273 Ark. 125, 617 S.W.2d 347 (1981) permits the exclusion of persons as prospective jurors *only* if they irrevocably oppose or favor the death penalty regardless of the evidence. Appellants insist that two of the veniremen, Mrs. Kaiser and Mrs. Dick should not have been excused for cause because of their uncertainty as to capital punishment and Mr. Harley Wood,

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who showed some preference for it, should have been excused for cause.

We have examined the questions asked in voir dire and the responses given and, typically, no clear conclusion can be drawn. The answers are tentative or equivocal, and the trial court is in a better position than we are to gauge the attitude of the veniremen and decide whether each will weigh the evidence and, if appropriate, will consider all the penalties provided by law. We cannot say his discretion was used wrongly in any instance complained of. *Hulsey v. State*, 268 Ark. 312, 595 S.W.2d 934 (1980); *McCree v. State*, 266 Ark. 465, 585 S.W.2d 938 (1979).

V.

THE TRIAL COURT ERRED IN LIMITING THE APPELLANTS TO A TOTAL OF TWELVE PEREMPTORY CHALLENGES.

[4] The trial court limited the four defendants to a total of twelve peremptory challenges, which they claim is error. We have held in three cases that where defendants are tried jointly each defendant is not entitled to the full allotment of peremptory challenges, but a challenge by one is a challenge by all. *Williams v. State*, 267 Ark. 527, 593 S.W.2d 8 (1979); *Lewis v. State*, 220 Ark. 914, 251 S.W.2d 490 (1952); *Hearne v. State*, 121 Ark. 460, 181 S.W.2d 291 (1915).

No absolute right to peremptory challenges exists under the constitution, see *Stilson v. United States*, 250 U.S. 583, 40 S.Ct. 28, 63 L.Ed. 1154 (1919) and we see no prejudice resulting from the position we have taken in the earlier decisions. The right to challenge a prospective juror on peremptory grounds may be exercised simply because counsel has reservations that certain groups might be skeptical of its theory of the case; it is a very general response and such criteria as occupation, education, age, residence, social background, sex, and even facial expression, may influence its use, depending on the nature of the case. But ordinarily these considerations are applicable to the defendants as a whole and not individually. Here, it appears the peremptory challenges were exercised collectively by the defense, as might be expected, and no argument is offered that for a specific reason one prospective juror was objectionable to one of the defendants, though not to the others. We adhere to our holding in *Williams v. State, supra*.

VI.

CALLING A FIVE DAY RECESS AT THE CLOSE OF TESTIMONY WAS AN ABUSE OF THE COURT'S DISCRETION.

[5] Appellants allege that it was an abuse of discretion for the trial court to order a five day recess as the trial was nearing a close. The recess occurred, evidently, between the taking of testimony and the instructions and arguments, because of the trial judge's scheduled participation in a meeting of the Arkansas Judicial Council. The trial seems to have commenced well in advance of the meeting, but moved at a slower pace than expected. Such matters as recesses and sequestration of the jury are not amenable to inflexible rules and must be governed to a great extent by the exigencies of the day and the calendar. We see no reason why it would work to the appellants' greater prejudice to recess from Wednesday to Monday, than from Friday to Monday, as often occurs in trials. We find no abuse of discretion.

VII.

IT WAS ERROR FOR THE JURY TO FIND THE AGGRAVATING CIRCUMSTANCE THAT, "IN THE COMMISSION OF THE CAPITAL MURDER, EACH OF THE APPELLANTS KNOWINGLY CREATED A GREAT RISK OF DEATH TO A PERSON OTHER THAN THE VICTIM."

[6] Citing *Williams v. State*, 274 Ark. 9, 621 S.W.2d 686 (1981), appellants contend that because Vickie Lehman and Virginia Lehman were victims of the underlying felony of aggravated robbery to the capital murder of Don Lehman, the evidence will not warrant a finding as an aggravating circumstance that appellants knowingly cre-

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ated a great risk of death to a person other than the victim. Appellants assert that *Williams v. State*, supports the argument, but fail to explain how. The holding there has no particular relevance to this case. Williams' death sentence was reduced because one of the aggravating circumstances found by the jury, commission of a prior felony, did not involve violence as required by Ark.Stat.Ann. § 41-1303 (Repl.1977). The decision also holds that where a jury finds no mitigating circumstances and three aggravating circumstances, one of which is erroneous, we will not regard the error as harmless simply because two aggravating circumstances remain, as we are not in a position to speculate as to what a jury would do on a finding of two aggravating factors instead of three.

The appellee submits that this point was not preserved by an objection to the instructions or to the verdict forms. Without implying that the point is otherwise meritorious, we decline to consider it for the lack of proper objections.

VIII.

IT WAS ERROR FOR THE TRIAL COURT TO PERMIT THE INTRODUCTION OF EVIDENCE OF OTHER CRIMES AND ACTS AGAINST APPELLANTS CLINES AND ORNDORFF.

[7] Mrs. Tammy Baker was called by the state to prove that the appellants had been at her home the evening of the Lehman murder, drinking beer and playing cards with her husband, Steve Baker. She said when she answered the door the four appellants were there, that one was wearing a ski mask and stuck a gun in her face. She was ordered to "stick 'em up'," before realizing that a joke was being played. The four stayed until about 9:30 p.m. and she overheard discussions involving the robbery of someone who lived nearby.

On cross-examination she was asked by counsel for one of the defendants, Clines, whether her husband was then facing charges of robbery committed the night before the Lehman crime. She said he was and was then asked if any of the appellants were involved and she said Orndorff and Clines were. Orndorff's objections to this line of questioning were overruled and when Steve Baker followed his wife to the stand the state was permitted to go into the incident in greater detail.

Appellants Clines and Orndorff complain that the admission of this evidence, as well as a statement by Billy Weaver that Darrell Richley told him he was the one who shot Don Lehman, that he had been involved in "stealing and robbing," violate the rule against admitting evidence of prior bad acts, citing, *Alford v. State*, 223 Ark. 330, 266 S.W.2d 804 (1954). But the Weaver comment was admitted with an admonition to the jury in accordance with the purposes of Rule 404(b), Uniform Rules of Evidence, and the Baker testimony has to be examined in light of the fact that it was Clines' lawyer who pointedly asked the questions that brought the evidence into the trial. Whether the object was to discredit Tammy and Steve Baker's testimony by showing that Baker was charged with similar conduct is speculation, but we are not persuaded that reversible error occurred. It is entirely possible that the evidence would have been received by the trial court under Rule 404(b) had it been offered for the purpose of proving identity, opportunity, intent, preparation, or absence of mistake. Certainly the evidence of a robbery involving similar methods committed in close timing with the offense on trial had probative value. The prejudicial aspect is not so obvious that we can say the court was clearly wrong.

IX.

IT WAS ERROR FOR THE COURT TO ALLOW THE JURY, IN THE SENTENCING PHASE, TO FIND APPELLANTS CLINES AND ORNDORFF HAD "PREVIOUSLY COMMITTED ANOTHER FELONY, AN ELEMENT OF WHICH WAS THE USE OR THREAT OF VIOLENCE TO ANOTHER PERSON OR CREATING A SUBSTANTIAL RISK OF DEATH OR SERIOUS PHYSICAL INJURY TO ANOTHER PERSON" ON THE UNCORROBORATED TESTIMONY OF AN ACCOMPLICE.

[8] After the appellants' guilt had been established and the penalty phase of the

trial was in progress the state was permitted to prove one of the seven aggravating circumstances listed in Ark.Stat.Ann. § 41–1303 (Repl.1977) by the testimony of Steve Baker that he, Clines and Orndorff had previously committed another felony by the use or threat of violence. Baker said the three of them robbed Barry Cobbs and Tim Pettyjohn at gunpoint on January 7, 1981.

Appellants charge that since Steve Baker was an accomplice in the alleged robbery the penalty procedure violated the rule incorporated in Ark.Stat.Ann. § 43–2116, that a conviction cannot be had in any case upon the testimony of an accomplice unless there is corroboration by other evidence. As Steve Baker's testimony was not corroborated, appellants claim that error resulted. The argument cannot be sustained, if for no other reason than the fact that § 43–2116 deals with grounds for *conviction*, whereas § 41–1303 deals with proving that a crime of violence was previously *committed*. Beyond that, in *Miller v. State, supra*, we held that the same degree of proof is not required to sustain a finding that an aggravating or mitigating circumstance exists, as would be required to sustain a conviction if that circumstance was a separate crime. (*Miller*, 269 Ark. at p. 355, 605 S.W.2d 430). We said that if there was evidence of an aggravating or mitigating circumstance, however slight, it is sufficient to submit that issue to the jury.

X.

THE TRIAL COURT ERRED IN ADMITTING THE TENNIS SHOES OF THE APPELLANT CLINES.

We need not delay unduly with the issue raised by this argument, as the admission of the evidence itself was of little or no consequence. An investigating officer testified that he took an impression of a foot print from a flower bed of the Lehman home; that there was a high degree of probability that it matched Hoyt Clines' tennis shoe, however, he said it was impossible to be absolutely certain. But Clines' presence at the scene in company with the other appellants was amply evidenced by other proof and no objection to this evidence was offered until the trial, as required by A.R. Cr.P. Rule 16.2.

XI.

THE TRIAL COURT ERRED IN NOT GRANTING A MISTRIAL FOR TESTIMONY CONCERNING IMPLICATING OUT-OF-COURT STATEMENTS OF A CO-DEFENDANT, DARRYL V. RICHLEY, REGARDING APPELLANT CLINES.

[9, 10] Freddie Barker was called by the state to prove that Darryl Richley came to his home a day or two after the crime involving the Lehman family to ask his help in selling the guns taken from the Lehman home. Richley, he said, talked about his part in the murder, and told him four of them went to the door with ski masks and "busted on in", that one of the four started whipping Lehman with a motor chain belt, who made a break for the bedroom "and the guy pulled his mask off and kept hitting him. He said he got on the bed and that [Richley] shot him and said the guy kept going for a gun above the bed and he said he put the gun up to his head and shot him." The questioning continued at length, with no other reference to the removal of a mask, and not until the state fully completed its interrogation was any objection made. At that point counsel for Hoyt Clines moved for a mistrial on the grounds that there was previous testimony that it was Clines who had removed his mask and hence Clines was deprived of his right to confront opposing witnesses. This argument lacks merit, as objections must be timely, *Earl v. State*, 272 Ark. 5, 612 S.W.2d 98 (1981), and mistrials should be declared *only* when the trial court is certain the trial cannot, in fairness, continue. *Floyd v. State*, 278 Ark. 86, 643 S.W.2d 555 (1982).

XII.

THE EVIDENCE OBTAINED FROM THE SEARCH OF APPELLANT RICHLEY'S CAR AND APARTMENT SHOULD HAVE BEEN SUPPRESSED, BECAUSE THE SEARCH WARRANT WAS NOT BASED ON PROBABLE CAUSE AND THE CONSENT TO SEARCH GIVEN BY RICHLEY WAS NOT GIVEN VOLUNTARILY.

[11] Appellant Richley urges that the affidavit for the search warrant was defi-

cient in that no underlying circumstances for the affiant's conclusions were stated. He also argues that his consent was not voluntary. However, the search warrant and affidavit are not abstracted, as required by our rules, and the trial court found the appellant did give a lawful consent to the search. An independent determination of that issue has been made on review and we are satisfied the trial court's finding was entirely consistent with the evidence, particularly in view of Richley's testimony.

Finally, under A.R.Cr.P. Rule 36.24, and our rule 11(f), we find the treatment of other objections of appellants which were overruled, as well as rulings adverse to appellants, do not constitute reversible error. On a comparative basis we are not disposed to say the death penalty in this case is so wantonly, arbitrarily or freakishly imposed, or so excessive in relation to the crime, that we are compelled to modify the verdicts. There was sufficient evidence to support the findings of aggravating circumstances which were not outweighed by mitigating circumstances. We are satisfied the jury's verdict was relatively free of passion or prejudice. Accordingly, the judgments and sentences are affirmed.

DUDLEY, J., concurs in part and dissents in part.

PURTLE, J., dissents.

DUDLEY, Justice, concurring in part, dissenting in part.

The State adduced overwhelming evidence that the four appellants were guilty of jointly committing a capital murder and two robberies. Their individual defenses were not mutually antagonistic. Although the charges were joined and the appellants were jointly tried, the appellants as well as the State were afforded a just and fair proceeding through the accusatorial phase of the bifurcated capital murder trial.

However, that holding does not mandate the conclusion that the due process protections were sufficiently afforded at the joint sentencing phase of the capital murder trial. The two phases of the bifurcated trial serve vastly differing purposes. The essence of the accusatorial phase is the formal adversary presentation of evidence relative to guilt. The adversary concept places the State and the accused on an equal footing and so, in fairness to the State, joint trials are oftentimes required through this stage. Markedly different, the essence of the sentencing phase is the search for relevant information to choose which of the two penalties, life without parole or death, is appropriate for the person already found guilty. This second phase search for information is not based upon the same adversary concept. Our applicable statute provides that mitigating circumstances may be presented regardless of their admissibility under the rules of evidence while aggravating circumstances may be presented only when they are admissible under the rules of evidence. Ark.Stat.Ann. § 41–1301(4) (Repl.1977). The underlying reason for this is that the penalty of death is qualitatively different from all other punishments.

When the death penalty is sought, justice demands individual, not joint, sentencing. It is for this same reason that mandatory death sentences for particular crimes have been declared unconstitutional. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). It is only after a structured exercise of discretion which guarantees individualized sentencing that the death sentence may be imposed. *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). Accordingly, after a finding of guilty of capital murder, juries in this State may impose a sentence of death only after considering aggravating and mitigating circumstances. Ark.Stat.Ann. §§ 41–1301 & 1302 (Repl.1977). Aggravating circumstances are principally related to the personal history of the individual defendant and not to the nature of the crime committed. Ark.Stat.Ann. § 41–1303 (Repl.1977). Mitigating circumstances are totally related to the personal background of the defend-

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ant. *Id.* Individualized sentencing requires structured detailed consideration of the personal history of the guilty person before the death sentence may be imposed. Any impediment to that individualized exercise of discretion is violative of the protection of due process.

The clear issue is whether the joint sentencing procedure used in this case afforded each appellant the structured and detailed consideration of his individual background which is required before the sentence of death may be imposed. Surely no one can doubt that when the jury was sent out of the courtroom to fix the punishment for four equally guilty persons at one sitting, that after fixing the penalty for the first three at death, there was a great reluctance to give the fourth a lesser sentence. Such reluctance alone might arbitrarily mandate a fourth death penalty for the particular crime regardless of the guilty person's personal history. This impediment to the individual exercise of discretion violates due process and the prohibition against arbitrary death sentences.

Such a scenario may well have occurred in the case at bar. In the sentencing phase appellant Clines was shown to have pleaded guilty in 1978 to burglary, a non-violent crime. No other convictions or felonious actions were shown to have been committed by him during this stage of the trial. The only other proof of a prior bad action, for which there was no conviction, came during the accusatorial phase of the trial when an accomplice gave uncorroborated testimony on a collateral matter. Yet, he, too, was given the death sentence.

For this reason I dissent from that part of the well written majority opinion which affirms the joint proceeding to fix the punishments at death. I concur in that the part of the opinion affirming the life sentences for the aggravated robberies.

PURTLE, Justice, dissenting.

I believe at least one of the appellants, Michael Orndorff, was prejudiced by the trial court's refusal to give him a separate trial. To grant him a separate trial would have in no way selectively excluded him from culpability in regard to the crime for which he was convicted. In fact it seems to me that holding him to trial with the actual murderers practically insured his conviction. Guilt by association is a common human error and in this case I have no doubt it played a big part in the minds of the jury who meted out identical convictions and uniform penalties to all four appellants.

When each of the appellants attempted to place himself outside the bedroom where decedent was shot the result was that each defendant put before the same jury a defense inconsistent with the other defendants' defenses.

The majority opinion seems to infer some type of guilt from some of the appellants' failure to testify. If the trial court did this we would vote unanimously to reverse and remand. The trial court should have granted a severance.

A total of twelve peremptory challenges were allowed the four defendants. One of them did not get to exercise a single peremptory challenge. Had they been tried separately each would have been allowed twelve challenges. Therefore, these appellants were denied rights which are extended to others tried separately on identical charges. There is nothing to prevent a trial judge from allowing more than twelve peremptory challenges if fairness and impartiality demand it.

Furthermore, it was clearly prejudicial to allow evidence of crimes for which the appellants had not been convicted even though this was during the sentencing phase of the bifurcated trial. What happened to the old law that held every individual is presumed innocent? Soon it will be legal for the state to charge an accused of spurious crimes in order to help secure a conviction. For all we know none of the appellants were or will ever be found to have committed the alleged crime which was used during the sentencing phase.

I am still of the opinion that a death qualified jury is not comprised of a cross-

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section of the population as required by the Constitutions of Arkansas and the United States. It appears to me that there is a misunderstanding of the *Witherspoon* doctrine when prospective jurors are excluded because of religious or moral scruples against the death penalty. Perhaps some member or members of this very court have religious or moral scruples against the death sentence, yet we affirm such sentences if we find no reversible error. One who does not believe in the death sentence may honestly and conscientiously vote for such a sentence in upholding the law. For these reasons I must dissent to the majority opinion.

In re ARKANSAS SUPREME COURT BOARD OF CERTIFIED COURT REPORTER EXAMINERS.

No. 82-283.

Supreme Court of Arkansas.

July 5, 1983.

As Amended Dec. 19, 1983.

Voluntary nonprofit association of court reporters filed petition for adoption of rule providing for certification of court reporters and the establishment of an examiners' board. The Supreme Court held that board governing certification of court reporters would be established and rule adopted providing for such certification.

Ordered accordingly.

Regulations adopted, Ark., 658 S.W.2d 366.

1. Courts ⇐57

Board governing certification of court reporters would be established and rule adopted providing for such certification. Const. Art. 7, § 4.

2. Courts ⇐78

Supreme Court has inherent rule-making authority under provision of State Constitution conferring upon Supreme Court superintending control over all inferior courts of law or equity. Const. Art. 7, § 4.

Henry C. Morris, Judge of the Municipal Court of DeQueen, Sevier County, DeQueen, Joan Morgan Porter, President of the Arkansas Court Reporters Ass'n by James B. Blair, Atty., Springdale, David Burnett, Circuit Judge, Osceola, Donn Mixon, Jonesboro, Gill, Skokos, Simpson, Buford & Owen, P.A. by Theodore C. Skokos, Little Rock and Sigrid J. Cox, Court Reporter, DeQueen, amici curiae.

PER CURIAM.

On December 13, 1982, the Arkansas Court Reporters Association, a voluntary and non-profit association of court reporters in Arkansas, filed a petition asking the Supreme Court to adopt a rule providing for the certification of court reporters and the establishment of an Examiners' Board. The petition stated that standards were needed to protect the quality, accuracy, and professionalism of court reporting, that is, persons who take depositions and other matters within the purview of court reporting which may be admitted into evidence under the laws of Arkansas.

[1] On January 10, 1983, the Court accepted the petition and requested all interested parties to file briefs by May 1, 1983. After fully considering the various responses we conclude that a board governing the certification of court reporters should be established.

[2] Article 7, section 4 of the Arkansas Constitution confers upon this Court superintending control over all inferior courts of law or equity. This Court has inherent rule making authority under this provision of the Constitution. *In Re Arkansas Criminal Code Revision Commission, ex parte,* 259 Ark. 863, 530 S.W.2d 672 (1975). Therefore, the following Rule is adopted providing for

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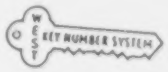
with his father? The child could not express his feelings at his tender age. How do we know how much he loves his father? Does he realize he most likely will never see his natural mother and father again? As I understand the record this child was living with his father in the house where the father was born and raised. Not every citizen of this state can afford a three bedroom air conditioned brick home in Little Rock. The pioneers of this state no doubt survived in less comfortable circumstances than they desired. I feel certain this father would much rather live in a modern home but his circumstances in life do not at this time allow him to do so. If we are to believe it is in the best interest of a child to transplant him into what we perceive to be a better environment, then we open the gate to the highest bidder. Children should never be for sale.

It is my opinion that the Social Services should have done more to encourage and teach these parents how to be good parents in their circumstances. The child was taken from the parents when he was only one month old. Before he was two years old the court had taken him from his parents under the allegation that the parents were "unfit" to properly care for him and that he was entitled to the love and affection of a normal home. How did the Social Services determine the child was not loved or that the parents were unfit? By allowing the parents to visit with their child under close scrutiny and apparently spasmodically. It is obvious from the record that the foster mother was as unpredictable as the natural mother. This child should have been placed in another foster home or returned to the natural parents under close supervision, in my opinion. I agree with appellant that the remedial support services designed to reunite this child and his parents as required by Ark.Stat.Ann. § 56-128(F) (Supp.1983) were not provided in this case. *A.B. v. Arkansas Social Services*, 273 Ark. 261, 620 S.W.2d 271 (1981).

I would not grant the petition without proof of further rehabilitation attempts by the Social Services. In my opinion the proof, as it relates to the father, is not clear and convincing that this father has failed significantly without any justifiable cause to support and care for the child. The fact that a parent may be poor and ignorant is not by itself grounds for permanently destroying their natural relationship. It seems to me there must be more than this record reveals before a child and his parents are separated forever.



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Hoyt Franklin CLINES, James William Holmes, Darryl V. Richley and Michael Ray Orndorff, Petitioners,

v.

STATE of Arkansas, Respondent.

No. CR 82-54.

Supreme Court of Arkansas.

May 29, 1984.

Petitioners were convicted in the Circuit Court, Benton County, of capital murder and aggravated robbery, and following appeal, filed petition for postconviction relief. The Supreme Court held that: (1) by not raising issue at trial and on appeal, petitioners waived claim that rule which gave discretion to trial court to try defendants jointly in capital case unconstitutionally repealed initiated act which entitled codefendants in capital cases to separate trials as matter of right, and (2) petitioners failed to establish ineffective assistance of counsel.

Petition denied.

Dudley and Hollingsworth, JJ., would grant.

1. Criminal Law ⇐998(3).

By not raising issue at trial and on appeal, petitioners seeking post conviction

Appendix "B" B1

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relief waived claim that rule which gave discretion to trial court to try defendants jointly in capital case unconstitutionally repealed initiated act which entitled codefendants in capital cases to separate trials as matter of right. Rules Crim.Proc., Rule 22.1 et seq.; Const.Amend. No. 7.

2. Criminal Law ⇐998(3)

No issue, even if it presents question of constitutional dimension, is preserved beyond direct appeal unless it is of such fundamental nature that judgment would be rendered void.

3. Criminal Law ⇐998(6)

Lack of jurisdiction is sufficient to void judgment.

4. Criminal Law ⇐161

Conviction obtained in violation of provisions against double jeopardy is void. U.S.C.A. Const.Amend. 5.

5. Criminal Law ⇐998(13)

Trial court's denial of petitioners' motion for severance on grounds advanced at trial and considered on appeal was unavailable to petitioners as basis for postconviction relief. Rules Crim.Proc., Rule 37.1 et seq.

6. Criminal Law ⇐998(3)

Challenges which are not made at trial or on appeal in a court with controlling rules of procedure are waived for purposes of postconviction proceeding.

7. Criminal Law ⇐998(5)

Postconviction relief is limited to grounds sufficient to void judgment or open it to collateral attack.

8. Criminal Law ⇐641.13(1)

To establish ineffective assistance of counsel, petitioner must first show that he was prejudiced by conduct of counsel.

9. Criminal Law ⇐998(13)

Petitioners failed to establish ineffective assistance of counsel for failure to raise severance issue on grounds that rule unconstitutionally repealed initiated act which entitled codefendants in capital cases to separate trials as a matter of right, where petitioners failed to demonstrate on appeal that jury was unable to fairly distinguish between them in guilt and penalty phase of trial and death penalty was not capriciously or arbitrarily imposed.

10. Criminal Law ⇐998(3)

Allegations that prosecutor failed to comply with discovery provisions and that capital murder statute was unconstitutional in that individual culpability was not taken into account, and that it was improper to place burden on codefendant to prove that he did not himself commit murder could have been raised at trial and on appeal on grounds stated in postconviction petition, and were not sufficient to render judgment void, and therefore, were waived.

Marshall N. Carlisle, Fayetteville, for Holmes.

Matthew Horan, Fayetteville, for Richley.

Priscilla Karen Pope, Fayetteville, for Orndorff.

Charles E. Hanks, Fayetteville, for Clines.

Steve Clark, Atty. Gen. by Alice Ann Burns, Deputy Atty. Gen., Little Rock, for appellee.

PER CURIAM.

The four petitioners were jointly tried and found guilty of the capital murder of Don Lehman and the aggravated robbery of his wife and daughter. We affirmed. *Clines, Holmes, Richley and Orndorff v. State*, 280 Ark. 77, 656 S.W.2d 684 (1983), *cert. denied*, — U.S. —, 104 S.Ct. 1328, 79 L.Ed.2d 723 (1984). The petitioners have now filed a petition for relief pursuant to our postconviction rule, Rule 37.

Petitioners first allege that A.R.Cr.P. Rule 22 which gives discretion to the trial court to try defendants jointly in a capital case unconstitutionally repealed Initiated Act I of 1937. Act I entitled co-defendants in capital cases to separate trials as a matter of right. Rule 22 was promulgated pursuant to Act 470 of 1971, which was

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adopted unanimously by the General Assembly and "in harmony with the Court's constitutional superintending control over all trial courts." *In Re Arkansas Criminal Code Revision Commission*, 259 Ark. 863, 530 S.W.2d 672 (1975). Petitioners contend that counsel was ineffective in failing to raise the severance issue on this ground even though counsel did ask for a severance and further raised the issue of denial of severance on appeal. Petitioners base their allegation on Amendment 7 to the Arkansas Constitution which provides:

> No measure approved by a vote of the people shall be amended or repealed by the General Assembly or by any City Council, except upon a yea and nay vote on roll call, of two-thirds of all the members elected to each house of the General Assembly, or of the City council, as the case may be.

[1-7] It is true that Act 470 of 1971 (Ark.Stat.Ann. § 22-242) which allowed adoption of rules of criminal procedure had the effect of repealing some provisions which had been enacted by initiated acts. It is also true that when Act 470 was passed, the legislators could not know which initiated acts would eventually be replaced. We further agree that Act 470 in conjunction with this court's power to promulgate rules of procedure had the effect of denying petitioners separate trials. Nevertheless, while there is a serious question as to whether Initiated Act I was constitutionally repealed by Rule 22, we need not reach that question here because petitioners waived the issue by not raising it at trial and on appeal. No issue, even if it presents a question of constitutional dimension, is preserved beyond direct appeal unless it is of such fundamental nature that the judgment would be rendered void. *Neal v. State*, 270 Ark. 442, 605 S.W.2d 421 (1980). Such fundamental questions are few. Lack of jurisdiction is sufficient to void a judgment; as is a conviction obtained in violation of the provisions against double jeopardy. See *Martin v. State*, 277 Ark. 175, 639 S.W.2d 738 (1982); *Rowe v. State*, 275 Ark. 37, 627 S.W.2d 16 (1982). The repeal of an initiated act by means of a vote of the legislature allowing the adoption of non-specific rules of criminal procedure, however, does not void judgments in cases tried under the adopted rules of procedure. Moreover, the trial court's denial of the petitioner's motion for severance on the grounds advanced at trial and considered on appeal is also unavailable to petitioners as a basis for postconviction relief. Grounds raised on appeal are exhausted and cannot be reargued under Rule 37. *Hill v. State*, 278 Ark. 194, 644 S.W.2d 282 (1983). If criminal cases are to have finality, it must be recognized that a fair trial and a full consideration of asserted error on appeal are the means by which the majority of issues are finally settled. Challenges which are not made at trial or on appeal in accordance with the controlling rules of procedure are waived. *Collins v. State*, 271 Ark. 825, 611 S.W.2d 182, *cert. denied*, 452 U.S. 973, 101 S.Ct. 3127, 69 L.Ed.2d 984 (1981). Postconviction relief is limited to grounds sufficient to void the judgment or open it to collateral attack.

[8, 9] Petitioners have attempted to collaterally attack their judgments on the basis of ineffective assistance of counsel, alleging that counsel was ineffective for failing to raise the severance issue on the grounds that Rule 22 unconstitutionally repealed Act I of 1937; but to establish ineffective assistance counsel, a petitioner must first show that he was prejudiced by the conduct of counsel. *Strickland v. Washington*, — U.S. —, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). On appeal, the issue of whether petitioners were prejudiced by the denial of the motion for severance was considered and decided adversely to them. Petitioners failed to demonstrate on appeal that the jury was unable to fairly distinguish between them in the guilt and penalty phases of the trial. As we said on appeal, the facts before the jury indicated that the blame for Mr. Lehman's murder rested with near equality on all four petitioners. The safeguards in our law whereby capital defendants are tried and sentenced are intended to prevent the arbitrary and capricious imposition of the death

penalty. The death penalty in this case was not capriciously or arbitrarily imposed. As petitioners have failed to establish that severance was necessary to protect their right to a fair trial at any stage of the proceedings, their sentences will not be disturbed.

[10] Petitioners also allege that the prosecutor failed to comply with discovery provisions and that the capital murder statute is unconstitutional in that (1) individual culpability is not taken in to account, and (2) it is improper to place the burden on a co-defendant to prove that he did not himself commit the murder. Since each of these allegations could have been raised at trial and on appeal on the grounds stated in this petition and is not sufficient to render the judgment void, they must be considered waived. *Swindler v. State*, 272 Ark. 340, 617 S.W.2d 1 (1981).

Finally, the petitioners state that the last eleven allegations contained in the petition were raised on appeal. They adopt the arguments raised at that time, but the issues are not cognizable under Rule 37 because the issues have already been decided on appeal. *Neal v. State.*

Petition denied.

DUDLEY and HOLLINGSWORTH, JJ., would grant.

282 Ark. 596

Virgil DAUGHHETEE, Appellant,

v.

Ruby SHIPLEY, Nancy Jones, Brenda Carroll, Jo Shipley, Allen Shipley and Steve Shipley, Appellees.

No. 84-50.

Supreme Court of Arkansas.

June 4, 1984.

Driver of truck owned by his father hit cow. Subsequent to accident, truck owner died. His heirs brought suit against cow owner for $1,666, estimated cost of repairing vehicle. Cow owner filed motion to dismiss lawsuit contending heirs had no standing to bring suit on truck owner's behalf. Cow owner also filed amended answer, reserving grounds for dismissal, alleging contributory negligence, and filed counterclaim seeking $300 as value of cow. The Circuit Court, Randolph County, Andrew G. Ponder, J., dismissed motion to dismiss, dismissed counterclaim, and found in favor of heirs for $1,666, and cow owner appealed. The Supreme Court, Hollingsworth, J., held that: (1) heirs had no standing to bring lawsuit, and (2) trial court erred in awarding damages.

Reversed.

1. **Automobiles ⇐234**

Truck owner's heirs had no standing to bring lawsuit for damages against owner of cow involved in collision with truck, where heirs were not injured by any action of cow owner.

2. **Appeal and Error ⇐1036(1)**

It is not harmless error when wrong parties are allowed to institute legal action.

3. **Damages ⇐113**

Measure for damages for damage to personal property is difference in fair market value of property immediately before and immediately after occurrence. AMI 226.

4. **Damages ⇐113**

Reasonable costs of repairs may be considered in determining difference between fair market value of property immediately before and immediately after occurrence causing damage to property.

5. **Damages ⇐188(1)**

Where there was no testimony on value of truck either before or after collision with cow, and no direct testimony about what damage was done to cow, trial court

JUL 29 1988

CARL R. BRENTS, CLERK
By: M Johnson DEP. CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

CHAEL RAY ORNDORFF,
ME WILLIAM HOLMES,
YT FRANKLIN CLINES,
RYL V. RICHLEY

PB-C-84-300 (consolidated with)
PB-C-84-301
PB-C-84-302
PB-C-84-303

PETITIONERS

L LOCKHART, DIRECTOR,
KANSAS DEPARTMENT OF
RRECTIONS

RESPONDENT

MEMORANDUM AND ORDER

On the 20th day of April, 1987, a hearing was held on the consolidated petitions for habeas corpus filed by the petitioners, Michael Ray Orndorff, James William Holmes, Hoyt Franklin Clines and Daryl V. Richley, pursuant to 28 U.S.C. § 2254. For the reasons stated in this opinion the relief sought is granted in part and denied in part.

BACKGROUND

The facts giving rise to the instant petitions for habeas relief, stated in part in narrative form, are as follows. At approximately 9:45 p.m. on the night of January 8, 1981, the front doorbell rang at Don Lehman's home in Rogers, Arkansas. Lehman opened the door just a few inches to see who was there but was immediately shoved back as four masked men forced their way into his home. At least two of the men were armed with handguns and one was carrying a chain. Following a

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Appendix "C"

brief struggle with the intruders Lehman was thrown into his bedroom. He was probably shot once as he was thrown into the room, and was shot twice more while held down on his own bed. He died of the gunshot wounds within minutes. Approximately fifteen to thirty minutes later the four intruders fled the scene, taking with them over $1,200.00 in cash and Don Lehman's collection of guns. Lehman's wife and daughter were present during the entire incident.

Six days later an information was filed by the Benton County, Arkansas prosecuting attorney charging Orndorff, Holmes, Clines and Richley, collectively referred to as the petitioners, with capital felony murder. The information alleged that during or in furtherance of a robbery one or more of the petitioners caused the death of Don Lehman under circumstances manifesting extreme indifference to the value of human life. See Ark. Stat. Ann § 41-1501(1)(a) (Repl. 1977) (now codified at Ark. Code Ann. § 5-10-101 (1987)). On May 14, 1981 an amended information was filed which charged the petitioners each, in addition to the felony murder counts, with two counts of aggravated robbery for the alleged use of a deadly weapon with the purpose of committing a theft from Lehman's wife and daughter. See Ark. Stat. Ann. § 41-2102 (Repl. 1977) (now codified at Ark. Code Ann. § 5-12-103 (1987)).

The petitioners were tried jointly, despite numerous motions for severance, and the jury returned verdicts of guilty on all counts. On September 28, 1981 the trial judge sentenced each of the petitioners to consecutive life terms on the aggravated robbery counts and, following

the unanimous recommendation of the jurors, sentenced each of them to death by electrocution on the felony murder counts. The convictions were affirmed on appeal to the Arkansas Supreme Court and petitions for collateral relief pursuant to Arkansas Rule of Criminal Procedure 37 were summarily denied. See Clines v. State, 280 Ark. 77, 656 S.W. 2d 684 (1983), cert. denied, 465 U.S. 1051 (1983).

On June 28, 1984 appointed counsel filed in this court separate petitions for habeas corpus relief on behalf of each petitioner. These petitions were consolidated for disposition by order of October 23, 1984. Between June, 1985, and August, 1986, the case was closed for administrative purposes as there was a case before the United States Supreme Court which, if decided in the petitioners' favor, would have mandated that habeas relief be granted. It was not so decided and a hearing was scheduled for April, 1987, on the remaining issues raised in the consolidated petitions. See Lockhart v. McCree, 476 U.S.162 (1986), reversing sub nom, Grigsby v. Mabry, 758 F.2d 226, (8th Cir. 1985) (en banc)(in which the Eighth Circuit held the "death qualified Jury" unconstitutional). At the habeas hearing the court ordered that post-hearing briefs be filed and agreed to let counsel for each of the petitioners divide the issues raised so that they did not duplicate each other's efforts, and so they could each devote more time to the research of each issue. Following a delay of over one year, occasioned by numerous requests for extensions of time in which to file the briefs and the necessity of appointing substitute counsel for one of the petitioners after the briefs had been filed, the case is now ready for

disposition.

In their consolidated petition and common briefs the petitioners allege as grounds for relief: (1) that the Arkansas Capital Felony Murder Statute is unconstitutional; (2) that the trial court's denial of motions for severance violates their Fourteenth Amendment right of due process; (3) that the use of a "death qualified jury" violates the fair cross section requirement of the Sixth Amendment; (4) that the jury was improperly "death qualified" under Witherspoon v. Illinois, 391 U.S. 510 (1968); (5) that the crial court's decision limiting them to a total of twelve peremptory challenges violates their Fourteenth Amendment right to equal protection of the law; (6) that non disclosure of the fact that two state witnesses had been subjected to hypnosis at the prosecutor's direction violates their Sixth and Fourteenth Amendment rights; (7) that allowing the jury to consider the motive of "pecuniary gain" as an aggravating circumstance in the sentencing phase of the trial violates their Eighth Amendment rights; and (8) that petitioner Clines was denied his Sixth Amendment right to effective assistance of counsel. The respondent concedes that all state remedies have been exhausted. Each issue will be addressed below, not necessarily in the order raised.

I. HYPNOSIS

The murder victim's wife, Virginia Lehman, and their daughter, Vicki Lehman, were at home on January 8, 1981 and were witness to the

tragic events which took place that evening. On January 9 and January 14, 1981 both Virginia and Vicki were interviewed by the police and their statements were recorded. Vicki was able to give the police a description of the four masked men and she helped a police artist sketch the one who had removed his mask during the commission of the crime. She later identified petitioner Clines in a police line up as that man. The prosecutor testified at the habeas hearing, however, that on February 10, 1981 he had made the decision to have the Lehman women hypnotized. The reason articulated for this decision was that Virginia's descriptions were vague and that Vicki was unable to recall the name one of the intruders had called the other.

Carrying out his decision to hypnotize Virginia and Vicki the prosecutor enlisted the aid of one Gene Peters, who had learned how to hypnotize people in a six month course at the Springfield School of Hypnosis in Springfield, Missouri. That school has no official degree program, offers no diploma and has a faculty of one -- the owner. Following his "graduation" Peters made his living for a time by helping people to lose weight and stop smoking with the aid of hypnosis. He also worked with a couple of patients of a local dentist and hypnotized witnesses to a string of gas station hold-ups for the Rogers police department. Peters has never testified as an expert witness but was called to the stand once in a criminal trial when a former client of his asserted as a defense that he committed a bank robbery under the influence of a post-hypnotic suggestion. Peters has no degree from any accredited college or university.

At the prosecutor's suggestion Virginia and Vicki Lehman went to Peters' office to be hypnotized on February 18, 1981. Peters asked that the prosecutor not show him the Lehmans' prior statements because he did not want to be in a position to ask questions which suggested the answer. Peters had, however, previously seen newspaper accounts of the crime and he conducted more than one session with the Lehmans at which their stories were recited. In his deposition, which was introduced in evidence at the habeas hearing, Peters testified that he did not think Virginia was a good subject for hypnosis but that he would stand corrected if someone told him otherwise. He recalled that Vicki, on the other hand, was quite good and that he had four or five sessions with her. He only twice tried to hypnotize Virginia, and she testified at the hearing that she thought he had only two sessions with Vicki.

Virginia was permitted to attend Vicki's sessions with Peters, and Vicki was present at Virginia's. But other than Peters no others were present. During the sessions Peters would try to get his subjects to revisualize and relive the events of January 8 and, following each session, he and the Lehmans would report to the prosecutor's office. Peters took notes of each session but no electronic recording devices were used. His notes were never turned over to the prosecutor and have since been destroyed. Neither Peters or the prosecutor have any record of the questions asked and the responses given.

At the habeas hearing the prosecutor testified that he did not inform defense counsel that the Lehmans had been hypnotized because no

new information had been elicited and he did not consider the fact that hypnosis had been performed to be exculpatory evidence. In fact, counsel for the petitioners were not aware that hypnosis had been performed until after the appeal was filed with the Arkansas Supreme Court. The petitioners argue now that this failure to disclose the fact of hypnosis violates their Sixth Amendment right of confrontation and their Fourteenth Amendment right of due process. The state responds that the non disclosure was harmless error beyond a reasonable doubt.

A. The Sixth Amendment Claim

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with witnesses against him." The purpose of this right to confrontation is to secure for the defendant the opportunity for cross-examination, and the right is applicable to state as well as federal proceedings. Davis v. Alaska, 415 U.S. 308, 315 (1974); Douglas v. Alabama, 380 U.S. 415, 418 (1965). A defendant shows a violation of the Sixth Amendment right to confrontation if he proves that he was prevented from exposing facts to the jury from which they could reasonably make inferences about the reliability of the witness. Delaware v. Van Arsdall, 475 U.S. 673, 680 (1985); Davis v. Alaska, supra at 318; United States v. Gregory, 808 F.2d 679, 680-81 (8th Cir. 1987); United States v. Dempewolf, 817 F.2d 1318 (8th Cir.), cert.

denied, 108 S.Ct. 245 (1987). But an otherwise valid conviction should not be set aside if the reviewing court is able to confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt. Delaware v. Van Arsdall, supra at 684; Chapman v. California, 386 U.S. 18 (1967). In this case the court finds that there was constitutional error committed and that the error was not harmless beyond a reasonable doubt.

There have been a plethora of recent federal and state court decisions concerning the effects of hypnotically enhanced testimony, most of which are noted in the Supreme Court's recent decision on the subject. See Rock v. Arkansas, ___ U.S. ___ , 107 S.Ct. 2704 (1987). Although Rock decided the converse of the issue presented here -- the right of a previously hypnotized criminal defendant to testify on his own behalf -- that opinion is, nonetheless, instructive. In Rock, the Supreme Court granted certiorari to review a Supreme Court of Arkansas ruling which limited the testimony of a criminal defendant who had been hypnotized to "matters remembered and stated to the examiner prior to being placed under hypnosis." The basis for the Arkansas court's decision was that hypnotically refreshed testimony of a witness is inadmissible per se because the dangers of admitting such testimony always outweigh whatever probative value it may have. The Supreme Court vacated and remanded, reasoning instead that the per se exclusionary rule impermissibly infringed on a criminal defendant's right to testify on his own behalf, in part because the Arkansas rule left the trial court with no discretion to admit such testimony even if

it was determined to be reliable.

Discussing the reliability of hypnotically refreshed testimony the Court stated that the most common response to hypnosis appears to be an increase in both correct and incorrect recollections. Id. at 107 S.Ct. 2713. In the Court's words this occurs because

> [t]he subject becomes "suggestible" and may try to please the hypnotist with answers the subject thinks will be met with approval; the subject is likely to "confabulate," that is, to fill in details from the imagination in order to make answers more coherent and complete; and, the subject experiences "memory hardening," which gives him great confidence in both true and false memories, making effective cross-examination more difficult.

The Court went on to say that

> [t]he inaccuracies the process introduces can be reduced, although perhaps not eliminated, by the use of procedural safeguards. One set of suggested guidelines calls for hypnosis to be performed only by a psychologist or psychiatrist with special training in its use and who is independent of the investigation. These procedures reduce the possibility that biases will be communicated to the hypersuggestive subject by the hypnotist. Suggestion will be less likely also if the hypnosis is conducted in a neutral setting with no one present but the hypnotist and the subject. Tape or video recording of all interrogations, before, during, and after hypnosis, can help reveal if leading questions were asked ... Cross-examination, even in the face of a confident defendant, is an effective tool for revealing inconsistencies. Moreover, a jury can be educated to the risks of hypnosis through expert testimony and cautionary instructions. (citations omitted).

107 S.Ct. at 2713-14. Similar procedural safeguards have also been suggested by the Eighth Circuit Court of Appeals. See Sprynczynatyk v. General Motors Corp., 771 F.2d 1112 (8th Cir.), cert. denied, 475 U.S.

1046 (1986).

In the instant case it is undisputed that Vicki Lehman, one of only two occurrence witnesses, had been hypnotized prior to the time she participated in a reenactment of the crime and before she testified at trial. It is further undisputed that the trial court never had an opportunity to rule on the admissibility or reliability of her hypnotically refreshed testimony, because the fact that she had been hypnotized was never disclosed by the prosecution. Furthermore, it is apparent that virtually no procedural safeguards were followed. The hypnotist had no college degree in psychology or any other subject. He had read of the events in question in the local newspaper and had conducted his sessions without charge in the hope of uncovering a new lead which he could later "brag on." Virginia Lehman, the only other occurence witness, was present each time Vicki underwent hypnosis and the sessions were not electronically recorded. The only notes of the sessions have been destroyed and had been, prior to their destruction, in the sole possession of the hypnotist thereby making it virtually impossible to determine whether subtle or overt suggestions were introduced.

This haphazard manner in which the sessions were conducted leaves no doubt that the state's failure to disclose the fact that hypnosis was performed on one of its two occurrence witnesses prevented the petitioners from exposing facts to the jury from which they could make inferences about the reliability of the witness's testimony -- a violation of the confrontation clause of the Sixth Amendment. And the

prosecutor's own arguments at trial, in which he emphasized the clarity of Vicki Lehman's memory and the importance of her testimony, prevents the court from concluding that the error was harmless beyond a reasonable doubt. An example is illustrative.

The prosecutor began his opening statement by stating that the jury was going to be "amazed at the recollections" of Vicki Lehman. Then, in closing, he stated that

> [i]n spite of being faced with the traumatic ordeal as it happened, [Vicki] did not lose her presence of mind. She did not lose her sense of observation or objectivity. It was stored there. It took a little while to get it out of her, we had to talk to her several times. We had to go back and re-enact that scene finally and jerk her hair around, just like it was. Just like it happened to her to get her to remember if a gun was pointed here, who was here and who was there. It was stored in there and she was later able to recall it. And she recalled it well on the stand. I suggest to you that she saw and heard exactly what she testified to could not be doubted. Her physical description of these four people, just incredible. (Tr. 4269).
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> ...
>
> This girl has powers of observation that were working and working right then and never quit working. There were times when things were confusing, but I suggest to you that her testimony was unimpeachable. They tried to attack it and they got nowhere. (Tr. 4269-70).
>
> ...
>
> Her testimony is real important. Important for several reasons, two in particular. One, becuase it just describes the hideous crime, the hideous, unprovoked attack on -- breaking in the door and attacking her father. But two, her testimony showed unequivocally, that all four of these defendants -- each and every one of them -- were involved directly in the attack that resulted in her father's death. (Tr. 4270).

Had the fact of hypnotism been disclosed to defense counsel and the trial court this court may well have decided this issue differently.

Federal courts are in agreement that a witnesss' hypnotically enhanced testimony does not violate the confrontation clause, in and of itself, where both the witness and the hypnotist are available for cross-examination concerning the effects of the procedure. See, e.g. Clay v. Vose, 771 F.2d 1 (1st Cir. 1985), cert. denied, 475 U.S. 1022 (1986); Chaussard v. Fulcomer, 816 F.2d 925 (3rd Cir. 1987), cert. denied, 108 S.Ct. 139 (1988); McQueen v. Garrison, 814 F.2d 951 (4th Cir.), cert. denied, 108 S.Ct. 332 (1987); Harker v. State of Maryland, 800 F.2d 437 (4th Cir. 1986); Beck v. Norris, 801 F.2d 242 (6th Cir. 1986); United States v. Charles, 561 F.Supp. 694 (S.D.Tex. 1983). And the Eighth Circuit has adopted a flexible rule for the admissibility of hypnotically refreshed testimony whereby the district court may allow it after conducting a pretrial hearing to assess the effect of hypnosis upon the reliability of the testimony. The proponent of such evidence bears the burden of proof and, if such evidence is admitted, the opposing party may cross-examine concerning hypnosis and both parties may bring in experts to testify to the problems and benefits of hypnosis. Sprynczynatyk v. General Motors Corp., supra at 1122-24; Little v. Armontrout, 835 F.2d 1240 (8th Cir. 1987) (failure to provide indigent defendant with hypnotic expert violated defendant's right to fair trial).

The procedures followed in this case, however, compounded by the prosecutor's failure to disclose, denied the trial court an opportunity to assess the reliability of the testimony, denied the petitioners the right to full and effective cross-examination and denied the jury the

opportunity to assess the credibility of a key state witness from a proper perspective. All of the instances where Ms. Lehman's trial testimony differed from or added to her previous statements need not be discussed because the court finds that the prosecutor's failure to disclose was inherently prejudicial. As stated by one court,

> [o]nce a witness makes a recitation under hypnosis, his confidence in that supposed memory -- whether genuine or invented -- is greatly strengthened (sic). The witness then may have an unshakeable subjective conviction that gives his account on the witness stand the imprimatur of absolute confidence. (citations omitted).

United States v. Valdez, 722 F.2d 1196, 1202 (5th Cir. 1984). The petitioners have the right to bring this, and other problems associated with hypnotically refreshed memory before the jury on cross-examination.

The prosecutor knew, or should have known, that his failure to disclose may constitute reversible error. At the habeas hearing he testified that he did some legal research regarding hypnosis in which he located the case of United States v. Adams, 581 F.2d 193 (9th Cir.), cert. denied, 439 U.S. 1006 (1978). That case expressly states that reversals have been predicated on the failure to disclose the fact of hypnosis. Id. at 198. Yet, the prosecutor chose not to reveal that two witneses had been hypnotized and, in part because of that decision, this court finds that the petitioners' Sixth Amandment right to confront witnesses against them has been denied.

B. The Fourteenth Amendment Claim

The petitioners argue that their right to due process under the Fourteenth Amendment was denied because the prosecutor failed to inform defense counsel that a state witness, Vicki Lehman, had been hypnotized. The court agrees. Brady v. Maryland, 373 U.S. 83 (1963), holds that the suppression of evidence favorable to an accused upon request violates due process where the evidence is favorable either to guilt or punishment. And evidence which may be used to impeach a witness's credibility has been held to come within the Brady rule. Giglio v. United States, 405 U.S. 150, 154-55 (1972). Constitutional error occurs, however, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial. United States v. Bagley, 473 U.S. 667, 678 (1984). The court concludes in this case that there was constitutional error.

Arkansas Rule of Criminal Procedure 17.1 requires the prosecutor to disclose to defense counsel upon timely request

> any reports or statements of experts, made in connection with the particular case, including results of physcal or mental examinations, scientific tests, experiments or comparisons.

Additionally, a pretrial order was issued by the trial court which required the prosecutor to disclose, inter alia, the "results of scientific tests when available." The court has no doubt that hypnosis falls within the broad category of "scientific tests."

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Therefore, construing the pretrial order as conclusive evidence of a timely request, the court finds that disclosure was required under Brady.

Although numerous witnesses testified as to events which occurred prior to or after the robbery and murder, only Vicki and Virginia Lehman were witness to what took place inside their home. Moreover, since Virginia Lehman was instructed by the intruders to remain on the floor in a face down position Vicki's testimony became most important. She described in detail the way the four masked men broke through the door and the positions each of them took up inside the home. She retraced their movements and it was her testimony alone that placed all four intruders in the bedroom where the murder took place -- a deviation from her pretrial statement in which she could place only three men in that room when the shots were fired.

In contrast to Vicki's vivid testimony, Virginia Lehman's testimony was brief and was lacking in detail as to the events which unfolded. She remembers hearing the commotion when the intruders broke in and then she remembers hearing a shot, but cannot be sure where the people were when she heard it. Her testimony only places three of the intruders in the room and she remembers only one gun and one gunshot. This lack of detail in Virginia's testimony and the gaps in her memory highlight the importance of Vicki's testimony to the jury.

The court's review of the entire record does reveal, beyond a reasonable doubt, that the petitioners were responsible for the robbery homocide for which they were tried. Their activities in preparation

for the armed break-in and the events which later lead to their apprehension were fully documented through the testimony of thirty four prosecution witnesses. However, even though there is no question of their guilt for the crimes charged, the court is unable to say with confidence that the jury would have recommended the death penalty for each and every petitioner had defense counsel been informed of Vicki Lehman's hypnosis. Critical portions of her testimony may have been disregarded by the jury had they known of the effects of hypnosis, or the trial court may have deemed some testimony inadmissible altogether. Cf. Little v. Armontrout, supra (trial court's refusal to appoint an expert in hypnosis for an indigent defendant violated due process and rendered the trial fundamentally fair).

Therefore, it is the finding and decision of this court that the petitioners' Sixth and Fourteenth Amendments rights were violated, and that, unless the state either retries the petitioners or commutes their death sentences to life without parole within 120 days, the writ shall issue. For appeal purposes the court will now address the remaining issues raised by the petitioners.

II. ARKANSAS' FELONY MURDER STATUTE

The petitioners assert that the Arkansas Felony Murder Statute is unconstitutional because (a) it does not require the jury to consider the culpability of each defendant, (b) it provides for a mandatory death penalty, and (c) it is vague and overbroad. Each of these issues

was fully addressed and rejected by the Arkansas Supreme Court in a well written opinion with which this court concurs. See Clines v. State, supra. Accordingly, without further discussion, this claim for relief is denied.

III. SEPARATE TRIALS

The petitioners take the position that the trial court's denial of their motions for separate trials was an abuse of discretion which resulted in a "smear effect" among them and the exclusion of certain out of court statements alleged to be exculpatory to individual petitioners. Inasmuch as this argument turns on alleged violations of Arkansas procedural rules it does not state a claim for habeas relief. Rather, the petitioners must show that the trial court's failure to grant their motions for severance rendered the joint proceeding fundamentally unfair so as to violate due process. Johnson v. Dugger, 817 F.2d 726 (11th Cir. 1987); Manning v. Warden, Louisiana State Penitentiary, 786 F.2d 710 (5th Cir. 1986); Cf. Robnson v. Wyrick, 735 F.2d 1091 (8th Cir.), cert. denied, 469 U.S. 983 (1984) (to obtain federal habeas relief for failure to sever offenses, the joinder must render the trial fundamentally unfair). Upon review of the record the court finds that the petitioners have failed to meet their burden of proof.

At voir dire each of the jurors stated under oath that he or she could consider each defendant separately and they were instructed at

the close of trial that they must so consider each defendant, rendering separate verdicts as if each had been tried separately. The record shows more than ample evidence from which the jury could have found, beyond a reasonable doubt, that each petitioner was guilty of the crimes charged. There is simply no indication of a "smear" effect and, in the face of evidence showing unequivocally that the petitioners jointly planned and executed an armed robbery during which a homocide was committed the court cannot say that the petitioners were prejudiced by evidentiary rulings so as to make their trial fundamentally unfair. Accordingly, this claim for habeas relief is denied.

IV. JURY SELECTION UNDER WITHERSPOON

Witherspoon v. Illinois, 391 U.S. 510 (1968), holds that a state may not carry out a sentence of death imposed by a jury which was selected by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed religious or conscientious scruples against its infliction. Id. at 521-22. The most that can be demanded of a prospective juror is that he or she be willing to consider all of the penalties provided by state law, and that he or she not be irrevocably committed before the trial has begun to vote against the death penalty regardless of the facts and circumstances that might emerge. Id. at 522, n. 21. The petitioners contend here that the Witherspoon rule was violated with respect to three veniremen. The court disagrees.

The petitioners argue that Betty Kaiser was excused for cause because she stated that she didn't "think" she would impose the death penalty, and that Karen Dick was excused for cause because of her statement that she "might could" vote for the death penalty. They also state that their request to have Harley Woods excused was refused even though he said he could not vote for anything other than the death penalty on the first ballot, and that they had to exercise a peremptory strike against him which would have been used later.

In ruling on these claims on appeal the Arkansas Supreme Court held that, in context, the statements relied on were tentative or equivocal. The court went on to rule that the trial court was in the best position to gauge the attitude of the veniremen and that the trial court's discretion was not wrongly used. Clines v. State, 280 Ark. at 89-90, 656 S.W.2d at 688-89. These rulings of the trial court and the state supreme court are entitled to a presumption of correctness under 28 U.S.C. § 2254(d). Wainright v. Witt, 469 U.S.412 (1985). The petitioners have not overcome the presumption.

In addition to the excerpts of the voir dire relied on by the petitioners, Kaiser stated that she could not impose the death penalty herself, and that that feeling was fairly firmly fixed. When asked by the prosecutor if she could consider alternatively life without parole or death she answered that she could not. And she stated without equivocation that even though she believes some people deserve the death penalty she would not vote for it.

Dick was excused for cause both because she had preconceived

notions of guilt and because of her inability to consider the death penalty. She stated that at the time she received information from the media and third parties she had formed an opinion as to guilt or innocence. And she placed herself in a category of persons who, while not opposed to the death penalty, could not personally impose it. In addition, she stated that if the evidence presented a close question as to guilt or innocence she would feel some pressure to vote for guilt because of the expectations of third parties.

Woods, whom the trial court refused to excuse for cause, stated that facts and circumstances may dictate a sentence of life without parole as opposed to the death penalty. He assured the court that he could keep an open mind on punishment until he had heard all of the evidence in the sentencing phase of the trial. In response to defense counsel's question whether he thought the only permissible punishment for one convicted of capital murder was death he replied that it would have to be considered after weighing the evidence. Moreover, in response to a question by the court Woods stated that he could consider either life without parole or death and base his decision on the evidence.

Accordingly, the court finds that the trial court's rulings are supported by the record, that the Witherspoon rule was not violated and that this claim for habeas relief must be denied.

V. PEREMPTORY CHALLENGES

The trial court limited the petitioners to a total of twelve peremptory challenges pursuant to Ark. Stat. Ann. § 43-1929 (Repl. 1977) (now codified at Ark. Code Ann. § 16-33-307 (1987)), which provides that when several defendants are tried jointly a challenge by one shall be the challenge by all. The petitioners argue that, had they been tried separately, each would have been entitled to twelve peremptory challenges, and that because they were limited to a total of twelve in the joint proceeding they have been denied equal protection of the laws under the Fourteenth Amendment. This argument is without merit.

First, there is no constitutional right to peremptory challenge. Stilson v. United States, 250 U.S. 583 (1919). All that is guaranteed by the constitution is the right to an impartial jury. Id.; U.S. Const. Amend. VI. This the petitioners received. Second, since it is not argued that persons tried jointly comprise a suspect class, and there is not at issue a fundamental right guaranteed by the constitution, this court must analyze the petitioners' claim under the rational basis standard of review. Harris v. McCrae, 448 U.S. 297, 322 (1979) (quoting McGowan v. Maryland, 366 U.S. at 425). Under that standard the petitioners' claim fails because the state's legitimate interest in expediting trials, thereby conserving judicial resources, is rationally related to the procedural rule enacted. For the same reason, the petitioners' argument that the state rule is arbitrary and irrational in violation of the due process clause of the Fourteenth Amendment must also fail. See, e.g. Tarter v. James, 667 F.2d 964

(11th Cir. 1982) (statute allocating peremptory challenges on basis of county population rationally related to state's purpose). This claim for relief is, therefore, denied.

VI. INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner Clines alleges that his counsel at trial was ineffective because (a) on cross-examination of a state witness he elicited testimony that Clines had been involved in another crime the night before the Lehman incident, (b) he failed to timely object to introduction of a co-defendant's out of court statement which implicated Clines as the one who beat and/or killed Don Lehman, and (c) he failed to object to the introduction of Clines' tennis shoe into evidence. Analyzing these claims under the standard set forth in Strickland v. Washington, 466 U.S. 668 (1984), the court finds that Clines was not denied his Sixth Amendment right to effective assistance of counsel and that this claim for relief must be denied.

To prevail on a claim of ineffective assistance of counsel the petitioner must establish that counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. Id. at 686. In order to do so he must show first that the defense was prejudiced. To be prejudicial the errors of the petitioner's counsel must give rise to a reasonable probability that, in the absence of error, the result of the proceeding would have been different. Id. at 694. And to be deficient

the counsel's performance must fall below an objective standard of reasonableness when all circumstances are considered. Id. at 687-88. The petitioner must overcome the presumption that the challenged action might be considered sound trial strategy, and the reasonableness of counsel's actions may be determined or substantially influenced by the petitioner's own statements or actions. Id. at 691.

As to Clines' first claim, that counsel elicited damaging testimony from a state witness, the court need not reach the prejudice component of the Strickland test because counsel's strategy was not unreasonable. In his deposition, Clines' trial counsel stated that he had asked Clines about his involvement in prior crimes with the other three defendants. He said that Clines "categorically denied any involvement at all" and that "he made excuses, alibis, swore to us that he was not involved in anything" the state witness was testifying to. The alleged damaging questions were asked because counsel was "relying on what Clines had told [him]" and, on that basis, he made a "judgment call." The court finds counsel's actions to be objectively reasonable.

Clines admits in his brief that the prejudice resulting from the other two alleged errors was "very small" or "may or may not have been strong." The court agrees with this assessment. The admission of Clines' tennis shoe into evidence had virtually no bearing on the outcome of the trial as there was overwhelming evidence which placed Clines at the scene of the crime. The out of court statement of petitioner Richley, that Clines was the one who removed his mask and

beat Lehman with a chain, was likewise not prejudicial because Vicki Lehman had previously identified Clines as that man. She helped a police artist sketch Clines and she later identified him in a line-up. Moreover, state witness Tammy Baker established that Clines had possession of a chain shortly before he went to the Lehman home, and the state medical examiner testified that Lehman had been struck with a link type instrument.

VII. THE DEATH QUALIFIED JURY

In Lockhart v. McCree, 476 U.S.162 (1986), the Supreme Court ruled that death qualification -- the removal of jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors -- does not violate the "fair cross section" or "impartiality" guarantees of the Sixth Amendment. This case fully disposes of the petitioners' argument that death qualification is unconstitutional and that claim for relief is, accordingly, denied.

VIII. PECUNIARY GAIN AS AN ELEMENT OF THE UNDERLYING OFFENSE AND AS AN "AGGRAVATING CIRCUMSTANCE" TO JUSTIFY A PENALTY OF DEATH

In Lowenfield v. Phelps, 108 S.Ct. 546 (1988), the Supreme Court fully explored the "double counting" issue and held that there is no Eighth Amendment violation where an "aggravating circumstance" used to

justify the death penalty duplicates an element of the underlying offense. This case is disppositive of the issue as raised by the petitioners and, accordingly, this claim for relief is denied.

IX. VOLUNTARY WITHDRAWAL OF ISSUES RAISED

At the habeas hearing both petitioners Clines and Orndorff testified, against advice of counsel, that they would like to withdraw any issues which, if decided in their favor, could result at best in the reduction of their sentences to life without parole. And more recently, petitioner Richley has filed a pro se motion to dismiss his petition in its entirety. Counsel for each of the three have asked the court to order psychiatric examinations before ruling on the merits of the petitioners' requests -- which if granted would result in the petitioners' executions. For the reasons that follow the court deems it unnecessary to order the examinations or to rule on the requests to withdraw the petitions.

The state trial was a joint proceeding involving all four of the petitioners as co-defendants. And the court has ruled, above, that the trial was constitutionally defective. Because petitioner Holmes has not asked to withdraw his petition the court finds that all issues heretofore addressed in this opinion, with the exception of Clines' claim of ineffective assistance, were properly before it. Because of the role this court plays in the administration of justice it cannot permit the state to execute three of four co-defendants sentenced to

death following an unconstitutional proceeding. It is not the court's concern whether Clines, Orndorff and Richley wish to die at the hand of the state. Rather, it is the court's concern that if the state chooses to execute one convicted of a crime, it do so in a manner that comports with the Constitution of the United States. This the state has not done.

The petitioners' reliance on Gilmore v. Utah, 429 U.S. 1012 (1976) is misplaced. In that case the Supreme Court held only that it had no jurisdiction to hear an appeal of Gilmore's death sentence brought by a next friend where there had been no showing that Gilmore was unable to seek relief on his own behalf. In the instant case the court does have jurisdiction by virtue of Holmes' petition for habeas relief. Because Clines, Orndorff and Richley were Holmes' co-defendants in a joint trial, a finding by this court that the joint trial was conducted in an unconstitutional manner must inure to their benefit whether they sought to gain such relief or not.

X. CONCLUSION

For the foregoing reasons IT IS HEREBY ORDERED that the writ shall issue in 120 days unless the petitioners are given a new trial or, in the alternative, their sentences of death commuted to life without parole.

THIS 29 DAY OF July, 1988

HENRY WOODS, DISTRICT JUDGE

THIS DOCUMENT ENTERED ON DOCKET SHEET IN
COMPLIANCE WITH RULE 58 AND/OR 79(a) FRCP
ON 7/29/88 BY MJohnson

C27

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 88-2344

Michael Ray Orndorff,

Appellant,

v.

A. L. Lockhart, Director,
Arkansas Dept. of Correction,

Appellee.

* * * * * * *

James William Holmes,

Appellant,

v.

A. L. Lockhart, Director,
Arkansas Dept. of Correction,

Appellee.

* * * * * * *

Hoyt Franklin Clines,

Appellant,

v.

A. L. Lockhart, Director,
Arkansas Dept. of Correction,

Appellee.

* * * * * * *

Darryl V. Richley,

Appellant,

v.

A. L. Lockhart, Director,
Arkansas Dept. of Correction,

Appellee.

* Appeal from the United States District Court for the Eastern District of Arkansas.

Appendix "D" D1

No. 88-2405

Michael Ray Orndorff,

Appellee,

v.

A. L. Lockhart, Director,
Arkansas Dept. of Correction,

Appellant.

* * * * * *

James William Holmes,

Appellee,

v.

A. L. Lockhart, Director,
Arkansas Dept. of Correction,

Appellant.

* * * * * *

Hoyt Franklin Clines,

Appellee,

v.

A. L. Lockhart, Director,
Arkansas Dept. of Correction,

Appellant.

* * * * * *

Darryl V. Richley,

Appellee,

v.

A. L. Lockhart, Director,
Arkansas Dept. of Correction,

Appellant.

Appeal from the United States District Court for the Eastern District of Arkansas.

D2

Submitted: April 13, 1989

Filed:

Before BOWMAN, Circuit Judge, HENLEY, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

BOWMAN, Circuit Judge.

Michael Ray Orndorff, James William Holmes, Hoyt Franklin Clines, and Darryl V. Richley (petitioners) appeal, and A. L. Lockhart cross-appeals, from the judgment of the District Court[1] granting petitioners partial habeas corpus relief. We affirm in part, vacate in part, and remand for further proceedings.

In October 1981 petitioners were found guilty of the murder of Don Lehman in Rogers, Arkansas and were sentenced to death. The convictions were affirmed on direct appeal, Clines v. State, 280 Ark. 77, 656 S.W.2d 684 (1983), cert. denied, 465 U.S. 1051 (1984), and post-conviction relief was denied, Clines v. State, 282 Ark. 541, 669 S.W.2d 883 (1984). Petitioners filed petitions for habeas corpus relief in the District Court pursuant to 28 U.S.C. § 2254 (1988) in June 1984, and the cases were consolidated for joint disposition. After conducting an evidentiary hearing, the District Court issued a thorough memorandum and order from which the parties now appeal.

Although petitioners raised a number of grounds for habeas relief in the District Court, the principal issue below, and the ground upon which the District Court granted relief, concerned the state trial court's admission into evidence of the testimony of

[1]The Honorable Henry Woods, United States District Judge for the Eastern District of Arkansas.

D3

Vickie Lehman, the victim's daughter and a key prosecution witness. Unbeknownst to petitioners or to their trial counsel, Vickie and her mother Virginia Lehman had been placed under hypnosis by one Gene Peters roughly one month after the murder at the behest of the prosecutor. As the District Court found:

> During the sessions Peters would try to get his subjects to revisualize and relive the events of January 8 [1981] and, following each session, he and the Lehmans would report to the prosecutor's office. Peters took notes of each session but no electronic recording devices were used. His notes were never turned over to the prosecutor and have since been destroyed. Neither Peters [n]or the prosecutor have any record of the questions asked and the responses given.

Orndorff v. Lockhart, 707 F. Supp. 1062, 1066 (E.D. Ark. 1988). Petitioners' attorneys did not learn that Vickie Lehman had been hypnotized prior to trial until after they had filed the direct appeal in the Arkansas Supreme Court. Id.

The District Court ruled that the prosecutor's failure to apprise opposing counsel that Vickie Lehman had undergone hypnosis violated the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment, and that the use of her testimony at trial was not harmless error. In fashioning its remedy, however, the District Court permitted the state, as an alternative to retrying petitioners, to commute their death sentences to life imprisonment without the possibility of parole. Petitioners appeal from this ruling, claiming that the District Court erred in permitting the state the option of commutation. Lockhart concedes that the use of Vickie Lehman's testimony without disclosure of her hypnosis was constitutional error, but cross-appeals from the District Court's finding that the error was not harmless.

Given the scope of the cross-appeal, we assume without deciding that the District Court was correct in holding that the use of Vickie Lehman's post-hypnotic testimony violated the Confrontation Clause. In the District Court, petitioners sought to establish that the use of this testimony was not harmless error by demonstrating that Vickie Lehman's trial testimony differed significantly from statements she had given the police shortly after the crime occurred; the state sought to show that any variations were not material and that the error was therefore harmless. At issue were some 137 instances of such variations. Our difficulty with the District Court's treatment of the hypnosis issue stems from the fact that, although it purported to make a harmless-error inquiry, the District Court did not analyze these variations but rather held that the prosecutor's failure to disclose that Vickie Lehman had been hypnotized was "inherently prejudicial." Orndorff, 707 F. Supp. at 1069. The District Court reasoned that Vickie Lehman's testimony at trial was "inherently prejudicial" because post-hypnotic testimony may, generally speaking, appear more credible than ordinary testimony since the witness, through hypnosis, may gain a heightened conviction that what he or she believes to be the truth actually represents reality. See id. We believe this resolution of the harmless error inquiry to be unsound.

Assuming that the prosecutor's nondisclosure of Vickie Lehman's hypnosis ran afoul of the Confrontation Clause, that error is not harmful simply because the jury might have found her testimony less credible had defense counsel been able to probe the issue of her hypnosis on cross-examination. The fact that defense counsel was denied use of a legitimate means of cross-examining an adverse witness is not in and of itself grounds for disturbing a guilty verdict. See Delaware v. Van Arsdall. 475 U.S. 673, 680-81 (1986). The District Court's view of the matter, we believe, amounts to the contrary view, since it premises a finding of harmful error on little more than the (presumptively) enhanced

credibility of Vickie Lehman's testimony and defense counsel's inability to counteract it. As the Supreme Court stated in Van Arsdall:

> The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors . . . includ[ing] the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

475 U.S. at 684 (citations omitted).

We believe that the inquiry into the issue of harmless error in this case must begin with a comparison of Vicki Lehman's pre-hypnosis statements with her trial testimony in light of Van Arsdall. The District Court should make this comparison with an eye toward sorting those things about which Vicki Lehman could testify without aid of hypnosis (that is, from actual memory) from those things about which she could testify only after being hypnotized. Unless this sorting process reveals significant variations, the error should be deemed harmless.[2]

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[2]For example, in Byrd v. Armontrout, 880 F.2d 1 (8th Cir. 1989), we stated that any error with regard to the admission of post-hypnosis testimony fell short of constitutional magnitude where the record showed that the hypnosis did not affect the witness's testimony on any major point. 880 F.2d at 10, n.10. We made this observation despite defendant's contention that the witness's belief in her post-hypnosis testimony had been enhanced by the hypnosis. See Byrd, 686 F. Supp. 743, 771 (E.D. Mo. 1988). Similarly, in Williams v. Armontrout, 877 F.2d 1376 (8th Cir. 1989), cert. denied, 110 S. Ct. 1140 (1990), we concluded that even though hypnosis had rendered a witness's in-court identification of the defendant unreliable, habeas relief was not warranted because this identification "did not contribute to the conviction." Id. at 1380-81.

We therefore vacate the judgment of the District Court in part and remand the matter to the District Court for further proceedings.[3] The District Court already has determined that, beyond a reasonable doubt, the error here (if indeed there was harmful error) affected only the penalty phase of the trial, not the jury verdict finding petitioners guilty as charged.

> The court's review of the entire record does reveal, beyond a reasonable doubt, that the petitioners were responsible for the robbery homicide for which they were tried. Their activities in preparation for the armed break-in and the events which later lead to their apprehension were fully documented through the testimony of thirty four prosecution witnesses. However, even though there is no question of their guilt for the crimes charged, the court is unable to say with confidence that the jury would have recommended the death penalty for each and every petitioner had defense counsel been informed of Vicki Lehman's hypnosis. Critical portions of her testimony may have been disregarded by the jury had they known of the effects of hypnosis, or the trial court may have deemed some testimony inadmissible altogether. Cf. Little v. Armontrout, supra (trial court's refusal to appoint an expert in hypnosis for an indigent defendant violated due process and rendered the trial fundamentally [un]fair).

Orndorff v. Lockhart, 707 F. Supp. at 1070. Having reviewed the record, we are thoroughly satisfied, as was the District Court, that the harmful error here (if any) goes only to the imposition of the death penalty and not to the jury verdict finding petitioners guilty of capital felony murder. The evidence of petitioners' guilt, even without Vicki Lehman's testimony, is overwhelming.

---

[3]Having adjudicated the issue of the use of Vickie Lehman's testimony within the context of the Confrontation Clause, we need not consider whether the use of her testimony offends due process, as resolution of the due process claim would not affect in any way our disposition of this appeal.

Lockhart argues that, because the District Court found error affecting only the penalty phase of the trial, the court erred in ordering that the writ of habeas corpus issue unless the state either retries petitioners or commutes their death sentences to life without parole. We agree. In a habeas case, no less than any other, the remedy must be commensurate with the harm. Accordingly, if in light of this opinion the District Court finds on remand that the use of Vicki Lehman's testimony was not harmless error insofar as its effect upon the jury's recommendation that petitioners receive the death penalty is concerned, the court's order granting habeas relief should give the state the option of either conducting a new sentencing proceeding or reducing the sentences to life without parole. See Pickens v. Lockhart, 714 F.2d 1455, 1469 (8th Cir. 1983).[4]

We have considered petitioners' additional claims of error and find them to be without merit.

For the foregoing reasons, the judgment of the District Court is affirmed in part, vacated in part, and the matter remanded for further proceedings consistent with this opinion.

---

[4]In its cross-appeal the state also argues that the District Court erred in granting habeas relief to defendants Orndorff and Clines because they had requested the District Court not to consider any claim that would result only in the commutation of their death sentences to life imprisonment without parole, and to defendant Richley, who had moved the District Court to dismiss his habeas petition. However, in the joint reply brief filed by all four petitioners, they argue that the District Court did not err in granting habeas relief to all of them. We take this to constitute an abandonment by Orndorff, Clines, and Richley of the positions they took in this regard in the District Court, which abandonment renders the issue moot and thus not properly before us in this appeal.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

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FILED
U.S. DISTRICT COURT
EASTERN DISTRICT ARK.
APR 29 1991
CARL R. BRENTS, CLER
By: DEP CLER

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

MICHAEL RAY ORNDORFF — PETITIONER

V.

No. PB-C-84-300

A.L. LOCKHART, Director of the Arkansas Department of Correction — RESPONDENT

JAMES WILLIAM HOLMES — PETITIONER

V.

No. PB-C-84-301

A.L. LOCKHART, Director of the Arkansas Department of Correction — RESPONDENT

HOYT FRANKLIN CLINES — PETITIONER

V.

No. PB-C-84-302

A.L. LOCKHART, Director of the Arkansas Department of Correction — RESPONDENT

DARRYL V. RICHLEY — PETITIONER

V.

No. PB-C-84-303

A.L. LOCKHART, Director of the Arkansas Department of Correction — RESPONDENT

ORDER

Petitioners raised eight points in their original habeas proceeding before me. I found merit only in the fact that the prosecutor failed to inform either defense counsel or the court that the murder victim's wife and daughter had been hypnotized prior to the trial. I found the conduct on the part of the

prosecutor was inherently prejudicial. Orndorff v. Lockhart, 707 F.Supp. 1062, 1069 (E.D.Ark. 1988). The Court of Appeals reversed, holding that if the assumed error was harmless, it could not be the basis for habeas corpus relief. Orndorff v. Lockhart, 906 F.2d 1230 (8th Cir. 1990). The Court of Appeals directed me to compare Vicki Lehman's pre-hypnosis statements with her trial testimony with "an eye toward sorting those things about which [Ms] Lehman could testify without aid of hypnosis (that is, from actual memory) from those things about which she could testify only after being hypnotized." Id. The Court of Appeals stated that "[u]nless this sorting process reveals significant variations, the error should be deemed harmless." Id. at 1232.

In compliance with the mandate of the Court of Appeals, I have carefully compared the two pre-trial statements of Vicki Lehman with the trial testimony. Her accounts of the robbery-murder on the night of January 8, 1981 were given in question and answer form. The first interrogation was by Don Townsend, a Benton County Deputy Sheriff. It took place slightly more than three hours after her father was murdered and began a few minutes after 1:00 A.M. on the morning of January 9, 1981. The written transcript of the interrogation is twenty-six pages in length. The answers to the questions posed to Miss Lehman were intelligent and cogent. They were also concise. The second interrogation five days later on January 14, 1981 was conducted by the prosecuting attorney, David Clingor, also in question and answer form. The written transcript covered twenty-four pages. There is no material difference in the

accounts given by the witness. There are a few inconsequential differences, which would be expected in interrogations on two different occasions. At any rate, the differences in the statements are not an issue because both were taken before hypnosis. The issue is whether there was significant variation between the trial testimony and the January 9 and January 14 statements.

In contrast to the other interrogations, Ms. Lehman's trial testimony was one hundred forty pages in the trial transcript. Her direct examination consisted of 80 pages and the four cross-examinations consumed 60 pages. The in-trial questioning of Miss Lehman was obviously much more detailed than the two prior interrogations. She had gone to her home and participated in a reenactment of the crime. Between her initial statements and the trial, the witness had eight months to reflect on events surrounding the murder without the enormous stress that must have surrounded the statements of January 9 and January 14--one right after the murder and the other right after the funeral.

The prosecutor, in preparing the trial testimony of his principal witness, obviously spent a great deal of time on his direct examination and went into more detail on events. He fleshed out the bare bones accounts of the earlier interrogations. Such a procedure is normal. Immediately after a crime, a police interrogator is interested in obtaining the essentials. On trial the prosecutor's efforts are generally directed toward presenting a full, interesting and detailed account of the crime to the jury.

I do not find the significant variation which the Court of Appeals has held to be necessary. In contrast to instances when the witness simply elaborated on her previous statements, petitioners point out several instances of variation between Ms. Lehman's trial testimony and her previous statements. For instance, she testified at trial as follows: "There were like three masked men and they all had guns and for an instant they were all pointed right at me." (T. 3029). It is true that in her initial interrogation, she stated:

> Q. They got into the house. Then what happened?
>
> A. Then a couple of them were wrestling with him, they just kind of rolled over to the edge of the dining room table and I was just standing there and I saw the other two had guns on me.

(T. 4161-62). On January 14, she stated:

> A. At that time I could see dad and I could see him pushing back at the door and I...and as I was going to start pushing back at the door with him then that's when they all just came in. They were...from over there I could see three of them just all standing there with their guns and I just said what do you want, I can remember saying what do you want and then they were just fighting with dad.

(T. 4190). Later she stated:

> Q. Do you remember seeing any of those boys with guns in their hands? The two that were fighting with him?
>
> A. I can't recall. The only thing I can recall is whenever I saw the gun was...I know two of them standing there at me holding guns.
>
> Q. And two of them fighting on the floor.

(T. 4206).

insignificant, if it is actually a variation. That one of the men was identified as asking about the guns does not exclude the fact that the other two may have asked similar questions.

Another purported variation has to do with tail lights on the assailants' car. (T. 3054, 4169, 4186). This information was sought to assist in apprehension of the suspects and has no relevance to the crime and the punishment assessed by the jury. Similarly, in her initial interview, Ms. Lehman could not remember anything about the footwear of the man who was holding her. Like the tail light information, the police officer was making this inquiry to aid in the man's apprehension. It had nothing to do with guilt or punishment. This interrogation was made when the witness was under a great deal of stress. It is not surprising that she later could not remember every detail about the man's appearance.

After carefully considering the three interrogations of Ms. Lehman, I have concluded that there is a remarkable consistency in her recitations on all three occasions. There are no significant variations in her trial testimony and the previous interrogations. The questions were more detailed and her answers were more detailed. Petitioners have failed to shoulder the burden established by the Court of Appeals. They have failed to show any significant variation in her pre-hypnotic and posthypnotic testimony.

The habeas petitions by Michael R. Orndorff, James William Holmes, Hoyt Franklin Clines and Darryl v. Richley are therefore denied and dismissed.

This 29th day of April, 1991.

HENRY WOODS, U.S. District Judge

THIS DOCUMENT ENTERED ON DOCKET SHEET IN COMPLIANCE WITH RULE 58 AND/OR 79(a) FRCP
ON 4-30-91 BY

E7

FOR THE EIGHTH CIRCUIT

No. 91-3510

Michael Ray Orndorff,

Appellant,

v.

A. L. Lockhart, Director, Arkansas Department of Correction,

Appellee.

* Appeals from the United States District Court for the Eastern District of Arkansas.

No. 91-3512

James William Holmes,

Appellant,

v.

A. L. Lockhart, Director, Arkansas Department of Correction,

Appellee.

No. 91-3513

Hoyt Franklin Clines,

Appellant,

v.

A. L. Lockhart, Director, Arkansas Department of Correction,

Appellee.

F1
Appendix "F"

No. 91-3514

Darryl Richley,

Appellant,

v.

A. L. Lockhart, Director, Arkansas Department of Correction,

Appellee.

Submitted: June 8, 1992

Filed: July 15, 1993

Before RICHARD S. ARNOLD, Chief Judge, HENLEY, Senior Circuit Judge, and MAGILL, Circuit Judge.

HENLEY, Senior Circuit Judge.

We visit this habeas case for the second time. Michael Ray Orndorff, James William Holmes, Hoyt Franklin Clines, and Darryl V. Richley (petitioners) appeal from the judgment of the district court denying their requests for habeas relief under 28 U.S.C. § 2254. Petitioners were convicted of capital murder and were sentenced to suffer the death penalty. The district court found that at trial petitioners were denied their sixth amendment right to confront the witnesses against them. The court granted petitioners partial relief, finding that this error was harmless with respect to their convictions and affected only their death sentences. Respondent Lockhart concedes the error at trial, but contends this error was harmless with respect to the convictions and sentences. We affirmed that part of the decision denying

relief and remanded for further consideration. Williams v. Lockhart, 906 F.2d 1230 (8th Cir. 1990), cert. denied, 111 S. Ct. 1338 (1991). On remand from this court, the district court held that the error was harmless with respect to the petitioners' sentences and denied their requests for habeas relief. We affirm in part and reverse and remand in part.

I.

Petitioners broke into and robbed the house of Don Lehman in Rogers, Arkansas. In addition to stealing several hundred dollars and some guns, one or more of the petitioners shot and killed Don Lehman and threatened to kill his wife and daughter, who were in the house at the time.

At trial, Don Lehman's daughter, Vicki Lehman, testified in great detail about the murder-robbery. In addition to her trial testimony, she gave the police two statements which were recorded and transcribed: one within hours after the murder and another several days later. Although there are some variations between her trial testimony and her two pretrial statements, there are many similarities in her descriptions of what happened that night.

Vicki Lehman has consistently stated that at approximately 9:45 on the evening of January 8, 1981, she heard the front doorbell ring and got out of bed to go to the door. Vicki met her father in the hall on the way to the door and followed closely behind him. When her father unlocked the door, four men wearing ski masks forced their way into the house and attacked him. Vicki was held at gunpoint by one of the men while two or three others attempted to subdue her father who was struggling. Vicki was ordered to kneel down, face the wall, and put her head in her hands. She could sense that the fight had moved down the hall and into the bedroom. Vicki then heard two gunshots. Moments later, one of the men grabbed her by the back of the hair and led her through the house, searching for money and other valuables.

follows: (1) the tallest man who wore wire rim glasses that were visible through the ski mask, later identified as petitioner Richley; (2) the heavy or biggest man, later identified as petitioner Holmes; (3) the short or smallest man, later identified as petitioner Orndorff; and (4) the medium-sized man who removed his mask during the robbery, later identified as petitioner Clines. She got a very good look at the man who removed his mask, and within hours after the murder helped an investigator create a composite drawing of that man. Several days later she positively identified petitioner Clines in a line-up.

Vicki has also consistently described the sequence of events as she was led through the house. After she heard the gunshots, the tallest man with the glasses grabbed her and demanded to know where some money was. This tall intruder never let go of her until he left and constantly had his gun pointed at her head or back. She led him into her bedroom and produced an envelope containing some money she had received for Christmas. From her bedroom, Vicki was taken back down the hall, upstairs to a loft or office area above the main room, and then back downstairs. She was then led into her parents' bedroom where she saw her father laying motionless on the bed and her mother cowering in the corner. While in that bedroom, the medium-sized man found several hundred dollars in a drawer. He became excited and removed his mask. Then he and the heavy man began tearing out drawers and throwing clothes about the room searching for more money. The smallest man then suggested that she be allowed to call an ambulance for her father.

Vicki was taken into the kitchen area to use the phone. Before she was able to make the call, however, the medium-sized man grabbed the phone from her and stated she was not going to call anyone. Vicki then stared eye-to-eye with this unmasked man. All four attackers were in the kitchen area and they demanded more money and guns. Vicki directed them to the gun cabinet in the

living room. The tallest man, still holding Vicki, ordered two of the attackers, the smallest and medium-sized man, to get in the car and ordered the heavy man to remove the guns from the cabinet. The heavy man took the guns out to the car and the tallest man followed.

The police arrested all four petitioners within several days of the murder. After a joint trial, petitioners were convicted of armed robbery and capital murder. The death penalty was imposed on all four.[1] Petitioners exhausted their state remedies and filed petitions for habeas corpus relief in federal court. Petitioners raised several claims in their habeas petitions, but only one was found to have merit.

After petitioners had appealed to the Arkansas Supreme Court, they discovered that Vicki Lehman had been hypnotized prior to trial in an attempt to enhance her memory. The prosecutor had arranged for this hypnosis, but failed to inform the defendants or the trial court. In their habeas petitions, petitioners claimed they were denied their sixth amendment right to confront the witnesses against them because they were denied the opportunity to cross-examine Vicki Lehman about the hypnosis.[2] The district court found that the prosecutor's failure to inform the defendants about this hypnosis was constitutional error. The court further found that this error was harmless with respect to the petitioners' convictions of capital murder, but held that the error was not

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[1]In Arkansas, a person convicted of capital murder may receive the death penalty or life imprisonment without parole. Ark. Code Ann. § 5-10-110 (1987) ("A person commits capital murder if . . . he commits . . . robbery . . . and in furtherance of the felony . . . he or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life.").

[2]"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI.

harmless with respect to the petitioners' sentences. Orndorff v. Lockhart, 707 F. Supp. 1062 (E.D. Ark. 1988).

On appeal from that decision, we affirmed the district court's holding that the error did not warrant reversal of the convictions because "[t]he evidence of petitioners' guilt, even without Vicki Lehman's testimony, is overwhelming." Orndorff, 906 F.2d at 1233. We remanded the case, however, with directions for the district court to reconsider the question whether the error was harmless with respect to the petitioners' death sentences. Id. On remand, the district court found the error harmless and denied petitioners' request for habeas relief. Petitioners appeal from that decision.

II.

We begin with the premise that when reviewing a constitutional violation for harmless error, courts traditionally required "the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Chapman v. California, 386 U.S. 18, 24 (1967). The Supreme Court has recently altered this premise, holding that the correct harmless error standard in most habeas corpus cases is "whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.'" Brecht v. Abrahamson, 113 S.Ct. 1710, 1722 (1993) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946).[3] This court has recently noted the question whether the Brecht standard applies if the state courts never considered the harmless error issue because they found no error. Hoversten v. Iowa, No. 92-2402 (8th Cir. July 13, 1993). In Hoversten, however, this court declined to answer that question because the error was not harmless under either standard. Id. slip op. at 6. We now reach the unresolved question.

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[3]After this case was argued and submitted, the Supreme Court decided Brecht. At this court's request, the parties filed supplemental briefs discussing the effect Brecht may have on this case.

Brecht reached the Supreme Court after two state appellate courts, a federal district court, and a federal court of appeals had reviewed the error under the Chapman harmless error standard. Petitioners argue that the Court declined to apply the Chapman harmless error standard on collateral review because to do so would undermine "the finality of convictions that have survived direct review within the state court system." Brecht, 113 S.Ct. at 1720 (citations omitted). The Court noted that "[s]tate courts are fully qualified to identify constitutional error and evaluate its prejudicial effect on the trial process under Chapman," and that "it scarcely seems logical to require federal habeas courts to engage in the identical approach to harmless-error review that Chapman requires state courts to engage in on direct review." Id. at 1721.

We believe the Brecht rule is based largely on the notion that because the state courts can properly apply the Chapman harmless error standard on direct review, the federal habeas courts need only review those decisions under the Kotteakos harmless error standard. In the case before us, however, the state courts did not have the opportunity to review the error at all, and the federal habeas court was the first court to review the constitututional error under the Chapman harmless error standard. As a result, we find that rule announced in Brecht does not apply and that the Chapman harmless error standard is the appropriate test in this case.

We therefore must determine whether the error in this case "was harmless beyond a reasonable doubt." Chapman, 386 U.S. at 24. More specifically, in the context of this confrontation clause violation, "[t]he correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986) (listing five factors a reviewing court should evaluate

in making its decision).

In remanding this case, we instructed the district court to conduct its inquiry using the harmless error analysis set forth in Van Arsdall. We noted that the court should compare the pre-hypnotic statements to the trial testimony "with an eye toward sorting out those things about which Vicki Lehman could testify without the aid of hypnosis (that is, from actual memory) from those things about which she could testify only after being hypnotized." Orndorff, 906 F.2d at 1232. We further stated that "[u]nless this sorting process reveals significant differences, the error should be deemed harmless." Id. (footnote omitted). The district court found there to be a "remarkable consistency" in Vicki Lehman's recitations of the murder-robbery and therefore concluded the error was harmless.

After the district court made its ruling on remand, the Supreme Court decided Yates v. Evatt, 111 S. Ct. 1884 (1991). Petitioners argue that Yates changes the legal test announced in Van Arsdall and therefore the case must be remanded because the district court's legal analysis is flawed.[4] Respondent Lockhart argues that Yates deals with harmless error in the context of an improper presumption and therefore is not relevant to this confrontation clause harmless error analysis. We find that Yates is consistent with Van Arsdall and does not require us to remand.

In Yates, it was determined that the trial court's jury instructions created certain presumptions which improperly shifted the burden of proof from the prosecution to the defendant. In

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[4]After Yates was decided, petitioners requested the district court to reconsider its decision. The district court denied this request stating, "The Court will not resolve this question because it is a matter for the Court of Appeals." Orndorff v. Lockhart, No. PB-C-84-300 (E.D. Ark. Oct. 7, 1991) (order denying motions for new trial or hearing).

shifting jury instruction was harmless, the Court employed a two-step approach. In essence, a reviewing court must first establish "what evidence the jury actually considered in reaching its verdict." 111 S. Ct. at 1893. The purpose of this first step is to determine what evidence may have been considered as tending to prove the improperly presumed fact. The second step is to "weigh the probative force of that evidence [determined in the first step] as against the probative force of the presumption standing alone." Id. The Court concluded that the proper test is "whether the jury actually rested its verdict on evidence establishing the presumed fact beyond a reasonable doubt, independently of the presumption." Id.

Petitioners argue that the methodology used in Yates should be "extrapolated" to the present harmless error analysis of this confrontation clause violation. They argue that Yates requires a reviewing court to first determine what evidence the jury considered on the issue of the death sentence. According to petitioners, the court must then determine if there are any differences in the pre- and post-hypnotic testimony of Vicki Lehman, and finally determine whether the verdict of death actually rested on the hypnotically enhanced testimony. We agree with petitioners that Yates is instructive of our analysis, but we do not agree that Yates changes the Van Arsdall analysis.

In analyzing a violation of the confrontation clause for harmless error, the Court in Van Arsdall stated that:

> Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of corroborating or contradicting testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the

475 U.S. at 684. The fifth factor described in Van Arsdall (the overall strength of the prosecution's case) requires us to examine the evidence presented by the prosecution which the jury may have considered in deciding to impose the death sentence. In Lufkins v. Leapley, 965 F.2d 1477 (8th Cir. 1992), we analyzed a confrontation clause violation for harmless error and cited Yates for the proposition that "to determine whether the [error] was harmless beyond a reasonable doubt, we must examine the other evidence introduced at trial and determine whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" Id. at 1481.

In sum, our analysis under Yates, Van Arsdall, and Lufkins must proceed as follows. We must first compare the pre- and post-hypnotic statements to determine if any "significant differences" exist. If no significant differences are found, the error is deemed to be harmless. If, however, significant differences do exist, we must determine if the variations nevertheless are harmless. To accomplish that task, we assume that Vicki Lehman had been cross-examined about the hypnosis, and we also assume that the damaging potential of that cross-examination was fully realized. See Van Arsdall, 475 U.S. at 684. That is, we assume the jury was made aware of any changes in Vicki Lehman's story after the hypnosis, as well as the possibility of "confabulation," "suggestibility," and "memory-hardening" that is associated with hypnosis.[5] After making these assumptions, we must determine if we can still say that the error was harmless beyond a reasonable doubt. To determine whether the defendants' inability to cross-examine Vicki Lehman about the hypnosis did not contribute to the

[5]The dangers associated with using hypnotically-enhanced testimony in a criminal trial are discussed in some detail in Little v. Armontrout, 835 F.2d 1240, 1243 (8th Cir. 1988) (en banc) (citing Rock v. Arkansas, 483 U.S. 44, 58-60 (1987)).

jury's imposition of the death penalty. evidence introduced at trial which supported the verdict, as well as the other factors listed in Van Arsdall.

III.

We review the district court's harmless error analysis de novo, as a mixed question of law and fact. See, e.g., Gunn v. Newsome, 881 F.2d 949, 964 (11th Cir. 1989) (en banc); Graham v. Wilson, 828 F.2d 656, 659-60 (10th Cir. 1987). We therefore begin our analysis, as did the district court, with a comparison of Vicki Lehman's pre- and post-hypnotic statements. On appeal, petitioners claim Vicki Lehman made 134 post-hypnotic statements which contain significant variations from her two pre-hypnotic statements. They contend 83 of the statements are "new" and 51 of the statements are "changed" from her pre-hypnotic statements.[6]

Petitioners emphatically claim that Vicki Lehman has been inconsistent in remembering the number of guns she saw.[7] Petitioners argue that Vicki's pre-hypnotic statements indicate that at different times she saw either two or three guns, while at trial she testified that all four petitioners had guns.

Vicki Lehman has stated that she remembered seeing the petitioners with guns at two distinct times during the robbery. The first instance was immediately after the petitioners forced their way into the house. Vicki stated in her second pre-hypnotic statement that when the intruders forced their way in the door, three of the men pointed their guns at her for an instant while the fourth man attacked her father. Of those three men with guns, one then turned to the fight with her father, the tallest man grabbed

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[6]We refer to these statements as "New Statements Nos. 1-83" and "Changed Statements Nos. 1-51" as they are numbered in petitioners' briefs.

[7]This claim is made in Changed Statement No. 1.

her and held her at gunpoint, and the smallest [illegible]
with his gun. In her first statement, Vicki stated that two men immediately began wrestling with her father and the other two had their guns on her. In any event, Vicki has never wavered from her statement that petitioner Richley, the tallest man, had a gun. She saw the gun pointed at her and felt it pressed to her head and back throughout most of the ordeal. In addition, she has stated twice (once in the first pre-hypnotic statement and once in the second) that petitioner Orndorff, the smallest man, had a gun when he first entered the house.

The second instance Vicki remembered seeing guns was later that night when all four petitioners were with her in the kitchen. She recounted this event consistently in both of her pre-hypnosis statements. Vicki was taken to the kitchen from her parents' bedroom to call an ambulance, but petitioner Clines intervened and ripped the phone from the wall. Moments later, three of the petitioners stood in front of her with their guns. At trial, Vicki testified that she believed at that moment all four men had guns in their hands, one at her back and three in front of her. She testified later on cross-examination, however, that it was possible that there were only two guns pointed at her, but "it seem[ed] like" there were three guns in front of her.

In sorting through these statements, we conclude, as did the district court, that there is no material or significant difference between Vicki Lehman's pre- and post-hypnotic statements concerning the number of guns involved in this crime. She indicated before and after hypnosis that at least three of the petitioners, and possibly all four, carried guns.

Petitioners argue that Vicki Lehman's pre-hypnotic statements indicate that only three of the petitioners were in the bedroom at the time Don Lehman was murdered, but that her trial testimony

first pre-hypnotic statement, Vicki clearly indicated that the tallest man, Richley, stayed with her in the hall while the others were in the bedroom. In her second pre-hypnotic statement, however, Vicki was less sure that the tall man stayed with her. She indicated that she had her head down on the floor and that he could have gone into the bedroom with the others. Moreover, her second pre-hypnotic statement indicates that she was not positive that the man who originally grabbed her was the same man that grabbed her after the shots were fired. At trial, Vicki admitted on cross-examination that it was possible that not all of the petitioners were in the bedroom at the time she heard the shots fired.

Perhaps the most dramatic addition to Vicki Lehman's pre-hypnotic statements is her trial testimony about the behavior of petitioner Orndorff while inside the house.[9] At trial, she described Orndorff as "wirey acting" and "squirrely-acting." She testified that Orndorff liked to play with the little toys located on a bar in the main room and specifically testified that he liked to pull down the lever on the toy slot machine. There is no mention of this behavior in her pre-hypnotic statements. She also stated that "this little guy, the guy who was darting around all night, he kind of ran through there and swung on a chandelier and screamed real loud like he was happy or something." This incident allegedly occurred within minutes of Don Lehman's murder as Vicki was being taken into the kitchen to use the phone. The only pre-hypnosis mention of Orndorff's behavior in this regard was in response to a question by the police about the broken glass in the dining room. Vicki replied, "This happened later right before they left. He [referring to Orndorff] just went through there and

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[8]New Statements Nos. 28 and 29.

[9]New Statements Nos. 31-36, 40, 41, 80 and 81 and Changed Statements Nos. 20 and 38.

grabbed it . . . ." At trial Vicki also described an incident that occurred in her parents' bedroom while her father lay dying on the bed. She stated that the

> smaller guy was kind of kicking around through the -- through the clothes . . . and somebody commented that they'd better get out of there, that the neighbors had probably heard the guns and the smallest guy looked out the window. I can remember seeing him look out the window and he said something, I'm not real sure what he said, something about, 'The neighbors will see us,' or something.

This incident is not mentioned in either of the pre-hypnotic statements.

Petitioners also claim that Vicki Lehman changed her statements regarding petitioner Holmes' involvement. At trial, Vicki testified that after the phone was ripped off the wall, all four petitioners were with her in the kitchen "and they said, 'Where's any more money or where's some jewelry.' I can remember the big guy going, 'Guns. Guns. We know you have guns.'"[10] Petitioners claim this testimony is significantly different from her first pre-hypnotic statement in which she indicated that all three petitioners standing in front of her at that time demanded the guns, and from her second pre-hypnotic statement in which she said that the unmasked man, petitioner Clines, demanded the guns. Although her trial testimony is inconsistent with her second pre-hypnotic statement, it is not significantly different from her first pre-hypnotic statement in which she indicated that petitioner Holmes was one of the three men standing in front of her demanding guns.

At trial, Vicki testified that petitioner Holmes was the first one on her father when the petitioners forced their way through the

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[10]Changed Statement No. 44.

door. Petitioners claim this is a significant change -- pre-hypnotic statements. In both the pre-hypnotic statements, however, petitioners Holmes and Clines were immediately on her father as soon as the door opened and petitioners Richley and Orndorff stayed by her. The fact that at trial Vicki identified Holmes as being the first of two attackers who immediately pounced on her father is insignificant.

Some of the statements identified by the petitioners are not of any real consequence to the jury's determination of the sentence for various reasons. Some deal with events before the intruders broke into the house[12] or after the intruders left.[13] Several of the statements contain physical descriptions of the intruders[14] and, in particular, their shoes.[15] Others are descriptions of events that occurred during the robbery and are simply not new or changed.[16]

We can describe the remaining new or changed statements as adding detail, color, vividness, and perhaps credibility to Vicki Lehman's pre-hypnotic statements. Some of these statements describe in greater detail what occurred immediately after the petitioners forced their way into the house.[17] Others add detail

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[11]Changed Statement No. 2.

[12]New Statements Nos. 63-66 and 83.

[13]New Statements Nos. 49-62 and Changed Statements Nos. 45 and 46.

[14]New Statements Nos. 37-39.

[15]Changed Statements Nos. 13, 14 and 47-50.

[16]New Statement No. 30 and Changed Statements Nos. 32-37 and 42.

[17]New Statements Nos. 1-12, 71-73, 78 and 79 and Changed Statements Nos. 3-8 and 15.

to the actual fight that ensued. [illegible]
new statements because Vicki's pre-hypnotic statements indicated that she only "sensed" that the fight had moved into the bedroom. At trial she described her father getting away from the petitioners and being chased down the hall. Many of the statements describe various details as she walked from room to room with the intruders.[19] Several statements deal with Vicki's own thought processes or feelings during the robbery.[20] Other statements describe her mother's actions.[21] When viewed as a whole, these variations may have enhanced Vicki Lehman's credibility and therefore could have affected the jury's decision. However, as we noted in our prior decision, the "error is not harmful simply because the jury might have found her testimony less credible had defense counsel been able to probe the issue of her hypnosis on cross-examination." Orndorff, 906 F.2d at 1232.

The district court found that no significant differences existed between the pre- and post-hypnotic statements and therefore determined the error to be harmless without discussing the analysis set forth in Van Arsdall. We believe there to be enough variation, however, to warrant an examination of the differences in light of the Van Arsdall factors and we may make our own harmless error determination without remanding to the district court. See Yates, 111 S. Ct. at 1895 ("Although our usual practice in cases like these is to reverse and remand for a new determination under the correct standard, we have the authority to make our own assessment of the harmlessness of a constitutional error in the first

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[18]New Statements Nos. 13-23.

[19]New Statements Nos. 42-48, 67, 69, 70, 74-77 and 82 and Changed Statements Nos. 9-12, 16-19, 21-26, 30, 31, 39, 41, 43 and 51.

[20]New Statements Nos. 24-27 and 68.

[21]Changed Statements Nos. 27-29 and 40.

instance."); see also Lufkins, 965 F.2d at 1481 (holding that in certain circumstances, a reviewing court may conduct a harmless error analysis sua sponte).

The first four factors described in Van Arsdall clearly weigh in favor of petitioners. First, Vicki Lehman's trial testimony was very important to the prosecution's case; the prosecutor repeatedly said so to the jury. See Orndorff, 707 F. Supp. at 1068. Second, her testimony was certainly not cumulative since she was the only occurrence witness, other than her mother who saw and remembered very little, to testify for the state. Third, the only person to either corroborate or contradict her testimony on any material issues was petitioner Holmes. And fourth, the defense attorneys understandably cross-examined Vicki rather gingerly about any variations that they discovered in her trial testimony.

This brings us to our discussion of the fifth factor, the overall strength of the prosecution's case. Petitioners argue that they are entitled to an individualized evaluation and we agree. In this case, the prosecution's case against each defendant for the death penalty was different and we believe Yates and Van Arsdall require us to evaluate the case against each petitioner individually. For each petitioner, we will consider the variations in Vicki Lehman's testimony (that is, those things about which she could testify only after hypnosis) together with the evidence of aggravating and mitigating circumstances, and determine if we can nonetheless say that the error was harmless beyond a reasonable doubt.

We find the prosecution's case against petitioner Richley for imposition of the death penalty was strong. The jury found that

all three applicable statutory aggravating circumstances existed and that no mitigating circumstances existed. Vicki Lehman consistently described him as the leader of the group, and consistently stated that he threatened to kill her. At the penalty phase of the trial, the prosecution presented evidence that Richley had planned and executed a series of armed robberies in the months prior to the Lehman murder. The only variation in Vicki Lehman's statements which may have affected Richley's sentence was her testimony that all four petitioners were in the bedroom when the shots were fired. Although Vicki's first pre-hypnotic statement indicated that Richley was not in the room at the time the shots were fired, her second pre-hypnotic statement indicated that Richley could have been in the room. We can say, however, beyond a reasonable doubt that the error in this case did not contribute to petitioner Richley's death sentence.

We find that the prosecution's case against petitioner Holmes for imposition of the death penalty was strong. More importantly, we find that few if any of the variations in Vicki Lehman's statements were material to the prosecution's case against Holmes. The variations concerning Holmes involved Vicki stating that Holmes was the first man on her father and that Holmes was demanding the guns. As we discussed above, these statements are not really variations at all, and to the extent they are different, the differences are insignificant. The prosecution presented evidence which linked Holmes to several of the robberies allegedly committed by Richley. The jury found that all three statutory aggravating

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[22]The jury was given a verdict form which listed the following three aggravating circumstances: "1. [Petitioner] previously committed another felony an element of which was the use or threat of violence to another person or creating a substantial risk of death or serious physical injury to another person." See Ark. Code Ann. § 5-4-604(3) (1987). "2. In the commission of the capital murder, [petitioner] knowingly created a great risk of death to a person other than the victim." See id. § 5-4-604(4). And, "3. The capital murder was committed for pecuniary gain." See id. § 5-4-604(6).

circumstances existed, and that no mitigating circumstances existed. The error in this case did not contribute to petitioner Richley's death sentence beyond a reasonable doubt.

We also find that the prosecution's case against petitioner Clines for imposition of the death penalty was strong and that few if any of the variations in Vicki Lehman's testimony were material to the prosecution's case against Clines. Vicki's pre-hypnotic statements consistently identified Clines as one of the two men immediately upon her father and consistently placed him in the bedroom at the time of the murder. Moreover, Vicki consistently described Clines as the man who ripped the phone from the wall and prevented her from calling an ambulance for her father. The jury found all three aggravating circumstances existed and unanimously found that mitigating circumstances did exist by virtue of Clines' electrocution[23] and his excessive drinking. One or more of the jurors found that Clines suffered from a personality change after the electrocution. Because there are no significant variations in Vicki Lehman's testimony which may have affected the jury's decision to sentence Clines to death, we can say beyond a reasonable doubt that the error in this case did not contribute to petitioner Richley's death sentence.

We find that the prosecution's case against petitioner Orndorff for imposition of the death penalty was the weakest in this case. We also find that the variations in Vicki Lehman's testimony about Orndorff's behavior were the most significant. The jury found that only two of the three aggravating circumstances existed (the jury did not find that Orndorff created a great risk

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[23]In 1979, Clines was accidentally electrocuted while at work. At the penalty phase of the trial, evidence was submitted that Clines began drinking excessively and experienced a drastic personality change as a result of the accident. The prosecution also presented evidence that even before the accident, Clines drank excessively and had been convicted of robbery.

of death to a person once ... jurors found that two mitigating circumstances existed (that Orndorff was acting under unusual pressures or influences or under the domination of another person and that Orndorff was an accomplice and his participation was relatively minor). We cannot say beyond a reasonable doubt that the variations in Vicki Lehman's testimony did not contribute to the jury's decision to sentence Orndorff to death. Without Vicki Lehman's descriptions of Orndorff playing with toys, swinging from the chandelier, and looking out the window for the neighbors, the jury may have sentenced Orndorff to life imprisonment rather than death.

We therefore affirm the district court's denial of habeas relief to petitioners Richley, Holmes, and Clines. We reverse the denial of habeas relief to petitioner Orndorff and, in accordance with our previous decision, Orndorff, 906 F.2d at 1233, we remand the case to the district court with instructions that the court's order granting habeas relief should give the state the option of conducting a new sentencing proceeding or reducing the sentence to life without parole.

RICHARD S. ARNOLD, Chief Judge, concurring in part and dissenting in part.

For the reasons given by the Court, I concur in reversing the denial of habeas corpus relief to Michael Ray Orndorff. I concur also in denying this relief to Hoyt Franklyn Clines and James William Holmes. As to the imposition of the death penalty on Darryl V. Richley, however, I respectfully dissent. I would grant Richley the requested relief because the constitutional error -- the denial of the chance to cross-examine Vicki Lehman about her hypnosis -- was not harmless beyond a reasonable doubt. I disagree also with the Court's holding that our prior ruling in Orndorff v. Lockhart, 906 F.2d 1230 (8th Cir. 1990), cert. denied, 111 S. Ct. 1338 (1991), prevents us from considering the

hypnotized witness.

I.

As the Court has explained, using in a criminal prosecution the testimony of a previously hypnotized witness, even when the defendants were not given the chance to cross-examine the witness about the hypnosis, does not require automatic reversal. Rather, the Confrontation Clause error, the use of this testimony, is subject to a harmless-error analysis. Delaware v. Van Arsdall, 475 U.S. 673 (1986); Lufkins v. Leapley, 965 F.2d 1477, 1480-81 (8th Cir.), cert. denied, 113 S. Ct. 271 (1992); see also Williams v. Armontrout, 877 F.2d 1376, 1379-81 (8th Cir. 1989), cert. denied, 493 U.S. 1082 (1990) (due-process claim). The Court must find the error to be harmless beyond a reasonable doubt. Van Arsdall, 475 U.S. at 684; Chapman v. California, 386 U.S. 18, 24 (1967). Van Arsdall provides a list of five factors to be considered in analyzing the harmfulness of Confrontation Clause errors. Van Arsdall, 475 U.S. at 684. Before applying the Van Arsdall criteria to Richley's claim, however, I first consider this Court's interpretation of the holding of our earlier decision in this case, Orndorff V. Lockhart, supra.[1]

In that decision, we said that the Confrontation Clause error -- the deprivation of the chance to cross-examine Lehman about her hypnosis -- "is not harmful simply because the jury might have found her testimony less credible had defense counsel been able to probe the issue of her hypnosis on cross-examination." Orndorff, 906 F.2d at 1232. The Court today

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[1]Although in Orndorff the Court did not decide whether there was a violation of the Confrontation Clause, it was not necessary for it to do so. This was not in issue because the State already had conceded that the use of Lehman's testimony, without disclosure that she had been hypnotized, was a constitutional error. Orndorff, 906 F.2d at 1232.

evidently infers from this that, even if Lehman's testimony after hypnosis differed from or was more detailed than statements she made beforehand, we may not consider, in our harmless-error analysis, those discrepancies and additions serving only to enhance the credibility of her testimony.

I do not read Orndorff's holding as broadly as the Court does. Orndorff held that the mere possibility that hypnosis may have affected Lehman's testimony by rendering it more convincing did not in and of itself mean that the error was harmful. In that case, we vacated the lower court's holding that the 137 variations between Lehman's pre-hypnosis and post-hypnosis statements were "'inherently prejudicial.'" Orndorff, 906 F.2d at 1232 (quoting Orndorff, 707 F. Supp. 1062, 1069 (E.D. Ark. 1988)).[2] Instead, we required the District Court to analyze these variations. Orndorff, 906 F.2d at 1232. Thus, Orndorff does not require exclusion from our harmless-error analysis of the color, detail, and vividness that Lehman's post-hypnosis testimony added to her previous statements; it mandates evaluation of the effect of the specific changes and additions on the overall testimony, including, in my view, its credibility.

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[2]The District Court stated that "[a]ll of the instances where Ms. Lehman's trial testimony differed from or added to her previous statements need not be discussed because the court finds that the prosecutor's failure to disclose [the hypnosis] was inherently prejudicial." Orndorff v. Lockhart, 707 F. Supp. 1062, 1069 (E.D. Ark. 1988). The reason for this holding was the effect of hypnosis on trial testimony. Hypnosis has been known to enhance a witness's confidence in her testimony, whether true or imagined, once she has recited it under hypnosis. Id. This tends to make the testimony more convincing to the factfinder, id., and is known as "memory-hardening." Williams v. Armontrout, 877 F.2d 1376, 1380 (8th Cir. 1989). It is also important to scrutinize the particular effects of the post-hypnosis testimony because hypnosis causes not only memory-hardening, but also the creation of imaginary memories. Id.

evidence in determining whether the denial of the right to confront the witness was harmful would conflict with Delaware v. Van Arsdall, 475 U.S. 673 (1986). Van Arsdall, like this case, concerned the credibility of testimony. In that case, the Supreme Court addressed whether it was harmful error to prevent the defendant from cross-examining the government's witness about an unrelated criminal charge against him. Id. at 676, 679. The government had dropped that charge in exchange for his agreement to talk with the prosecutor about Van Arsdall, potentially biasing the witness's testimony. Id. at 676, 684. In Van Arsdall, as here, the prosecution was allowed "to introduce evidence that was not subject to constitutionally adequate cross-examination." Id. at 684. In both Van Arsdall and this case, the prohibited cross-examination might have enabled the defendants to "cast doubt on the testimony of an adverse witness." Id. And, here, as in Van Arsdall, "the reviewing court should be able to decide whether the not-fully-impeached evidence might have affected the reliability of the factfinding process at trial." Id.

Our task is to decide whether the error is harmless beyond a reasonable doubt. It must be harmless even "assuming the damaging potential of the cross-examination were fully realized." Van Arsdall, 475 U.S. at 684. To make this determination, we must consider the impact that the denied cross-examination would have had on Lehman's testimony, including its credibility. Cross-examination of Lehman about the effects of the hypnosis on her recollections might have prompted the jury to disregard those parts of her testimony relying upon new memories that arose after hypnosis. See Orndorff, 707 F. Supp. at 1070. Thus, we must be able to consider the color, vividness, and detail added to the post-hypnosis testimony (which may have been the product of memory-enhancement techniques). Although our earlier opinion does not allow us to presume that the many additions to Lehman's

error harmful, it permits us to consider how the detail, color, and vividness affected both the substance and credibility of Lehman's testimony in this particular case. As the Court recognizes, those details which go to the behavior and attitude of the petitioners during the crime could have persuaded the jury to impose the death penalty.

Because I interpret Orndorff to permit the evaluation of the effect of specific changed or added statements that add detail on the witness's testimony, including its credibility, I would analyze under the Van Arsdall factors the testimony that the Court declines to consider. See ante at nn. 11-20, at 14-15. I have therefore done so in reviewing Richley's claim.[3]

II.

In my view, the denial of the chance to cross-examine Lehman about her hypnosis was not harmless beyond a reasonable doubt with respect to the imposition of the death penalty on Richley. I discuss the points on which the Court and I agree before turning to how I would apply the Van Arsdall case's fifth factor to Richley.

I agree with the Court's analysis of the first four Van

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[3]I have also considered this sort of testimony in reviewing the claims of Holmes and Clines. Specifically, I have evaluated the additions to testimony that made Lehman's account more detailed, and those that, by describing her feelings and thoughts during the crime, enhanced both her credibility and the horror of the crime. For example, I have considered Lehman's new trial testimony that she remembered feeling like she needed to calm down and regulate her breathing, and that she recalled "crunching up" when she heard the gunshots. New Statements 24-27. Although such statements are legally material under Orndorff, they make no difference as to Holmes and Clines. I believe the jury would have imposed the death sentence on them even without these additions to the testimony.

case.-- as to each defendant individually.[5] I further agree that we must determine the effect of the error on the factfinding process at trial, Van Arsdall, 475 U.S. at 681, that is, on the sentence obtained, see Chapman, 386 U.S. at 24 (applying harmless-error analysis to the "verdict obtained"). To do this here, we must compare the overall strength of the prosecution's case for the death penalty with and without the hypnotically enhanced testimony. That is, "we must examine the other evidence introduced at the trial" to determine whether it affected the sentence imposed. Lufkins v. Leapley, 965 F.2d at 1481 (citing Yates v. Evatt, 111 S. Ct. at 1892). Although I agree with the Court's statement of the law, I disagree with its application of Van Arsdall's fifth factor in this case.

Richley first argues that Lehman's post-hypnosis testimony drastically altered the jurors' perception of his role in the death of her father. At trial, she testified that Richley left her while the shots were fired, suggesting that he was in the bedroom when her father was killed. New Statements 28 and 29, at App. 86-87. The State argues correctly that in her second pre-

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[4]However, I would emphasize them more than the Court does. Lehman's testimony undoubtedly influenced the severity of Richley's punishment because that testimony was almost the only testimony about Richley's behavior during the crime and his treatment of her and her family.

[5]I also agree with the Court's rejection of petitioner's argument that Yates v. Evatt, 111 S. Ct. 1884 (1991), overruled on other grounds, Estelle v. McGuire, 112 S. Ct. 475, 482 n.4 (1991), alters the harmless-error analysis in this case. Yates is consistent with the Van Arsdall test, particularly as an amplification of its fifth factor. Yates required a comparison of the probative force of the evidence the jury considered with the effect of the erroneous presumption given in the jury instructions. Id. at 1893.

stayed with her during the shooting. App. 48, 50. But neither did she know whether he had left -- only that he "wasn't touching" her then. App. 48. Moreover, she said very clearly in her first pre-hypnosis statement that Richley stayed with her during the shooting. App. 17-18, 19, 36. She said that the three other petitioners were in the bedroom, App. 33-34, that Richley was not, and that he "had ahold of me the whole time." App. 34.[6] At trial, she bolstered her testimony that Richley had left her during the shooting and then came back; she described her remembrance of Richley's heavy walk and his boots upon his return. Changed Statements 13, 14, 47, and 48, at App. 87-88, 160-61. But before her hypnosis she had said that she did not see Richley's feet. App. 23. The placement of Richley by her side during the shooting is key to his defense, particularly since he had said that he did not want to be part of a murder and he wanted to let Lehman call an ambulance for her father. App. 38, 54. This change in testimony, increasing the likelihood that the jurors would think that Richley was in the bedroom during the shooting, may well have strongly influenced the jurors in selecting his sentence. In my view, this change was not harmless beyond a reasonable doubt.

Other post-hypnosis statements may have influenced the jury to impose the death penalty because they portrayed Richley as a leader, controlling Lehman and the other men. E.g., New Statements 3 and 9 (Lehman addressing specifically Richley in asking what the intruders wanted); New Statement 7 (asking Lehman who else was home); New Statements 10, 11, 71, 73, 78, and 79 (noting his reactions to the fight and directing Orndorff to go help in the fight); Changed Statement 18 (telling Lehman to hand

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[6]At trial, she no longer recalled saying this. App. 191-92. Although this may be a normal memory lapse, it may well be attributable to the hypnosis.

Christmas money to Urquizu); New Statement 68 (recalling feeling that if she kept talking and searching for money, Richley might not shoot her). Juxtaposition of these post-hypnosis statements with the post-hypnosis placement of Richley in the bedroom at the time of the murder could also have influenced the jury in sentencing Richley to death.

It is true that Lehman's pre-hypnosis statements also showed Richley to be violent and a leader. E.g., App. 16 (telling Lehman to shut up); App. 18, 45 (leading her by her hair); App. 21 (pushing her hard, pushing gun against her head); App. 37 (Lehman stating that if anyone was the leader, it was probably Richley); App. 45-46 (carrying a gun). I still believe, however, that Lehman's trial testimony about Richley's location during the murder was very likely a decisive consideration in his sentencing (particularly since some of the jurors would have found his participation in the murder to be relatively minor and that of an accomplice, App. 257). Lehman's post-hypnosis trial testimony was vital to the prosecution's case for the death penalty and unique among the other testimony because of its detailed description of Richley's behavior and attitude while committing the crime. In my view, this testimony enhanced the strength of the prosecution's case for the death penalty and therefore is harmful, and reversible, error.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 91-3510/3512/3513/3514EAPB

Michael Ray Orndorff, et al.,

Plaintiffs - Appellants,

vs.

A. L. Lockhart, etc.,

Defendant - Appellee.

Order Denying Petitions for Rehearing and Suggestions for Rehearing En Banc

The suggestions for rehearing en banc are denied. Chief Judge Richard S. Arnold, Judge McMillian, and Judge John R. Gibson would grant the suggestion for rehearing en banc with regard to appellant Darryl V. Richley.

The petitions for rehearing are also denied.

September 21, 1993

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

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Appendix "G"